

***Prisoners or Servants?***  
***A history of the legal status of Britain's transported  
convicts***

by

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Alan Brooks

## ***Abstract***

The transportation of offenders from Britain between 1717 and 1853 depended upon a legal curiosity. In the administration of a criminal justice system, the private derivative proprietary right of the transportation contractor intruded so as to alter the status of the transported offender. The nature of the contractor's right, enshrined in the 1717 statute 4 Geo I c. 11, though occasionally considered in the literature, has rarely been the subject of any detailed analysis. This thesis sets out to rectify this omission by examining what the contractor's 'property in the services' of a offender actually meant, why it was such a pivotal part of the processes of transportation, how it was transferred to third parties, and with what result.

The thesis proceeds through three separate inquiries. In the first, the precursors to the 1717 legislation are reviewed so as to understand whether, and to what extent, the legislation of 1717 was modifying existing practice, or whether it was breaking new ground. The second line of inquiry examines the 1717 legislation, its immediate context, and the development of the scheme of transportation it created up until 1775 and the end of transportation to America. It will be demonstrated that the use of the concept of 'property in the service' of transported offenders was but one way of managing transportation and contrasts to the approach adopted in contemporary Ireland. The third line of inquiry re-examines the practices of transportation to Australia. Using contemporary legislation, government papers and legal instruments, a previously unrecognised outline of early transportations to New South Wales emerges. The thesis demonstrates that

the transfer of the contractor's proprietary right operated differentially from England, Ireland, and Scotland.

The thesis argues that the nature of the contractor's right to the service of transported offenders meant different things at different times. In colonial America it was clear that, through the process of 'sale', a transported offender became the servant of the transferee. The position in colonial Australia, however, is shown to be much less straightforward than is portrayed in the literature. Prior to 1824, the processes utilised to assign the contractor's property in the services of transported offenders, while resting on the same legal framework utilised in America, was intended to transform a convict into a servant of the governor. The evidence considered in the thesis demonstrates that this was not always successful, leaving the status of the offender in New South Wales in some doubt. Only after 1824 was it beyond question that a transported convict was, legally, a prisoner serving a custodial sentence.

This thesis enables a better understanding of the processes of transportation, both to colonial America and then to colonial Australia. By examining these processes through the prism of the status of the transported offenders, a more nuanced understanding of the consequences of transportation emerges.

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## Abbreviations:

AO	Audit Office records at the National Archives, Kew.
CO	Colonial Office records at the National Archives, Kew.
CON	Convicts records at the Tasmanian Archive and Heritage Office, Hobart.
ER	<i>English Reports – Full Reprint</i> (Edinburgh, 1900-30) Nominate Reports also cite the <i>English Reports</i> reference.
HO	Home Office records at the National Archives, Kew.
HRA	<i>Historical Records of Australia</i> . Various styled 1 HRA, 3 HRA, and 4 HRA; meaning Series 1, Series 3 and Series 4 respectively.
HRNSW	<i>Historical Records of New South Wales</i>
JHC	<i>Journals of the House of Commons</i>
JHCKI	<i>Journals of the House of Commons of the Kingdom of Ireland</i>
JHL	<i>Journals of the House of Lords</i>
JHLKI	<i>Journals of the House of Lords of the Kingdom of Ireland</i>
PC	Privy Council records at the National Archives, Kew.
SRNSW	State Records of New South Wales.
T	Treasury records at the National Archives, Kew.
QUB Db	Queen's University Belfast Database

## Introductory Notes

The issues considered in this thesis cover a period of approximately four hundred years. During this period the national identity of the separate jurisdictions within the British Isles changed, the calendar was reformed, and the citation of statutes was streamlined. These changes are treated in this thesis as follows:

‘England’ is used to identify that country prior to the union with Scotland in 1707.

‘Britain’ is used to identify the united countries of England and Scotland after 1707. The union of 1707, however, did not bring about a united legal system and transportation legislation after 1707 applied differentially. Legislation was applied to ‘that part of Great Britain called *England*,’ or to ‘*Scotland*’, as appropriate.

Until 1801, Ireland was a separate kingdom with its own legislative and criminal justice regimes. After 1 January 1801, and for the remainder of the period covered by this thesis, Ireland was a part of the United Kingdom of Great Britain and Ireland and was subject to laws made at Westminster. The Union of 1801 did little to merge the British and Irish criminal justice systems, particularly with regard to transportation. ‘Britain’ or ‘British’ is also used where United Kingdom legislation did not apply to Ireland.

The Julian calendar remained in use in England and Scotland until 2 September 1752. In England, but not in Scotland, the year commenced on 25 March. This changed in 1752 when the 1750 statute, *An Act for regulating the Commencement of the Year, and for correcting the Calendar now in use* came into effect.<sup>1</sup> 1752 commenced in England on 1 January. From 14 September the Gregorian calendar

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<sup>1</sup> 24 Geo II c. 23, Section 1, and the Calendar Act of 1751, 25 Geo II, c. 30.

was applied in both England and Scotland.<sup>2</sup> In line with this practice, dates in this thesis before 2 September 1752 (that is dates used in Chapters 1, 2, and 3) use the Julian (or Old Style) calendar. From 14 September 1752 dates in this thesis use the Gregorian calendar.

The use of short titles for legislation was largely dictated by parliamentarians and the legal profession. The Short Titles Act of 1896, developed as an aid to future parliamentary draftsmen, set out short titles for a number of older acts still being referred to. Some of these ‘retrospective’ short titles apply to statutes referred to here. The statute 4 Geo I c. 11, which is at the centre of this thesis, is listed in the 1896 Short Titles Act as *The Piracy Act, 1717*. For clarity purposes, this thesis follows two standard legal practices: first, statutes are identified by regnal year citations. Second, statutes enacted before 1793, instead of using the calendar year in which royal assent was given, cite the calendar year of the commencement of the parliamentary session at which the enabling bill was passed.<sup>3</sup>

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<sup>2</sup> The change was brought about by deleting the days from the 3<sup>rd</sup> to the 13<sup>th</sup> of September. Additionally, changes were made in the calculation of leap years.

<sup>3</sup> WF Craies, *A Treatise on Statute Law: With Appendices Containing Statutory and Judicial Definitions of Certain Words and Expressions Used in Statutes, Popular and Short Titles of Statutes and the Interpretation Act, 1889* (London, 1911), p. 56 and see 33 Geo III c. 13. Pursuant to the *Act of Parliament Commencement Act 1793*, dates of royal assent are now included at the top of every printed copy.

## Introduction

On 21 March 1717 George I attended the House of Lords at Westminster to give royal assent to thirty-five bills passed by his third parliament and to prorogue the sitting. One of the bills given assent had the following long title:

An Act for the further preventing Robbery, Burglary and other Felonies, and for the more effectual Transportation of Felons, and unlawful Exporters of Wool; and for declaring the Law upon some Points relating to Pirates:<sup>1</sup>

One of the provisions of this statute, which is referred to in this thesis simply by its regnal year citation as ‘4 Geo I c. 11’, is central to the research questions under examination. As part of the long title suggested, the statute sought to strengthen deterrents for crimes against property and to respond to perceived inefficiencies in implementing the punishment of transportation.<sup>2</sup> The result was the first of a two-part attempt to overhaul the management of transportation within the English criminal justice system. The second part of the overhaul was carried out in 1719.<sup>3</sup> Laws authorising transportation (by one designation or another) had been on the English statute books since 1597 and the actual practice of transporting offenders may have begun as early as 1603 under James I, but its early use lacked any consistent application or implementation.<sup>4</sup> These shortcomings were addressed in 4 Geo I c. 11. Having provided a mechanism for the transportation to America of two classes of offenders, that is, those within clergy, and those subject to a pardon from the king on condition of transportation, the statute then addressed the role of

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<sup>1</sup> *Journal of the House of Lords* (hereafter, *JHL*), Volume XX, p. 662.

<sup>2</sup> As the long title suggests, the act addressed a number of issues. The interaction between some of these is considered in Chapter 3.

<sup>3</sup> *The Act for further preventing Robbery, Burglary, and other Felonies, and for the more effectual Transportation of Felons*: 6 Geo I c. 23.

<sup>4</sup> Beattie pointed out that by the end of the seventeenth century the use of transportation was in decline. JM Beattie, *Crime and the Courts in England 1660-1800* (Oxford, 1986), p. 478.

the contractor undertaking the actual shipment of offenders to America.<sup>5</sup> With respect to those offenders within clergy, trial courts were given:

the power to convey, transfer and make over such Offenders, by Order of Court, to the Use of any Person or Persons who shall contract for the Performance of such Transportation, to him or them, and his and their Assigns, for such Term of seven Years;

A somewhat different procedure applied with respect to offenders outside clergy.

Here the act provided that where:

his Majesty, his Heirs or Successors, shall be graciously pleased to extend Royal Mercy to any such Offenders, upon the Condition of Transportation to any Part of *America* ... It shall and may be lawful to and for any Court having proper Authority, to allow such Offenders the Benefit of a Pardon under the Great Seal, and to order and direct the like Transfer and Conveyance to any Person or Persons, (who will contract for the Performance of such Transportation) and to his and their Assigns,

Section I ended with the words:

and such Person or Persons so contracting, as aforesaid, his or their Assigns, by virtue of such Order of Transfer, as aforesaid, shall have a Property and interest in the Service of such Offenders for such Term of Years.

This formula—a ‘Property and interest in the service of such Offenders’—was new to English law.<sup>6</sup> It had not been used prior to 1717 but was to be utilised in all subsequent legislative enhancements to the practice of transporting offenders from Britain thereafter. In 1784 the words ‘and interest’ were omitted.<sup>7</sup> The shortened formula ‘property in the service of the offender’ was in place at the time of the departure of the First Fleet to Botany Bay in New South Wales in 1787. It was utilised again in Section VIII of the final major revision to the British

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<sup>5</sup> Section VIII of the Act limited its operation to England and excluded Scotland.

<sup>6</sup> See below for consideration of HB Simpson’s argument in 1899 that property in the service of offenders had its origins in legislation of 1547, the statute 1 Edw VI c. 3, sometimes referred to as the slave legislation. This argument is contested in Chapter 2. HB Simpson, "Penal Servitude: Its Past and Its Future," *The Law Quarterly Review*, 15 (1899), p. 37.

<sup>77</sup> See 24 Geo III c. 56.

transportation legislation of 1824, the statute 5 Geo IV c. 84 which remained in effect until transportation to Van Diemen's Land ceased in 1853. There was no equivalent use of the formula in any other legislation within the English criminal justice system. The principal research question asked in this thesis is: what did the formula, 'a property and interest in the service of the offender' mean, and how did the formula affect the status of a transported offender?

The Australian historian Alan Atkinson commenced his 1990 paper 'State and Empire and Convict Transportation, 1718-1812' with the observation that: 'Sometimes change in Britain can be understood by looking from the edge of the British Empire.'<sup>8</sup> Using Atkinson's approach in this research, is it possible to provide some context to an understanding of the formula 'a property in the service of the offender'? One example 'from the edge' of the Empire is used here in illustration. In October 1795, Captain John Hunter, the Governor of New South Wales, raised a concern with his superiors in London. Hunter wrote to the Duke of Portland, the Secretary of State for the Home Department, pointing to his inability to manage four convicts who had arrived in New South Wales the previous year. Hunter wrote:

It has been customary to have the servitude of other convicts assigned over to the Governor of the settlement for the time being, in order to their being disposed of for the benefit of the public; but this has not been the case with respect to these men.<sup>9</sup>

The 'men' referred to by Hunter were four of the so called 'Scottish Martyrs' transported to New South Wales for sedition in Scotland during 1793 and 1794. Their circumstances, and how and why different arrangement applied to them, are

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<sup>8</sup> Alan Atkinson, "State and Empire and Convict Transportation, 1718-1812" (paper presented at the Occasional Seminar Papers No. 5, University of London, (1990), p. 25.

<sup>9</sup> Hunter to Portland, 25 October 1795; *Historical Records of Australia, Series 1* (hereinafter 1 HRA), Volume 1, p. 542.

examined in Chapter 5. However, Governor Hunter's concern neatly encapsulated the processes of transportation from England and Scotland in 1795. Hunter had expected to receive the 'assignment' (and therefore the 'servitude') of disembarking convicts from the contractor who had shipped the convicts to New South Wales. As he pointed out, this would have enabled the disposal of convicts 'for the benefit of the public'. Both Governor Hunter and the Duke of Portland would have understood that this was the rationale of the punishment of transportation. Put simply, the 'men' would have been both prisoners and servants to the governor. Hunter did not need to spell out to the Duke that, in the normal course, by means of the (in this case, incomplete) process of assignment, he would have acquired property in the service of all convicts arriving in New South Wales including, of course, the four Scottish convicts. But what was 'property in the service' of a convict? How was it constituted? How was it assigned? What was the connection between property in the service of transported convicts, servitude, and the (incomplete) process of assignment of 'the men'?

Governor Hunter seemed to suggest to the Duke of Portland that, in the immediate circumstances of the Scottish Martyrs, his capabilities as governor and the disposition of convicts under his authority in New South Wales was somehow diminished. Perhaps with good sense, Hunter did not ask the Duke about the consequences of process failure. Yet exactly this problem was to occur in New South Wales some sixteen weeks later. On 11 February 1796 the convict transport *Marquis Cornwallis* arrived from Ireland prompting Hunter to write again to the Duke complaining that:



Every ship from that country [Ireland] have omitted to bring any account of the conviction or term of transportation of those they bring out to this, nor do we receive any assignment of their services, because none have been made out to the master of the ship.<sup>10</sup>

The processes described by Governor Hunter, deficient as they seemed to have been, appeared to beg the obvious question: why was such an assignment required at all? Why were the convicts not simply treated as ‘prisoners’ and their circumstances treated as if they were serving sentences of imprisonment, albeit it in a place of detention on the far side of the world? This thesis seeks to answer that question by examining the arrangements by which the expectations of Governor Hunter were usually put in place, both in Britain and in New South Wales and what happened if those arrangements failed.

This research examines the circumstances of transported convicts through the prism of the processes by which their transportation was carried out. By considering transportation in this way, variances emerge in the traditional view of transportation which involved much more than the mere despatch of prisoners to foreign parts to serve their sentences. In approaching this research, three broad lines of supplementary inquiry have developed. First, as already indicated, the statute 4 Geo I c. 11 was not the first statutory provision invoking the punishment of transportation from England. So, in order to place 4 Geo I c. 11 into context, a linear history of the use of transportation has been developed where none exists currently.<sup>11</sup> In parallel, the status of transported offenders in the place to which

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<sup>10</sup> Hunter to Portland, 3 March 1796; 1 *HRA* Volume 1, p. 555. For the movements of the *Marquis Cornwallis* see Charles Bateson, *The Convict Ships 1789-1868* (Glasgow, 1969; reprint, 2nd.), p. 147.

<sup>11</sup> WF Craies, writing in 1890, HB Simpson in 1899, Eris O’Brien writing in 1937, and AGL Shaw, writing in 1966, provide brief catalogues of prior legislation, but none is comprehensive. See William F Craies, "The Compulsion of Subjects to Leave the Realm," *Law Quarterly Review*, 6 (1890), pp. 388-410. Simpson, "Penal Servitude: Its Past and Its Future", Eris O'Brien, *The Foundation of Australia (1786-1800)* (Westport, Connecticut, 1937; reprint, 1970), p. 311. AGL

they were transported is also considered. This linear history identifies and catalogues relevant legislation for the whole of the period of transportation from the British Isles. In a wider context therefore, and as an extension of the first supplementary inquiry, the thesis identifies other forms of transportation that existed before 1717 or were used in parallel. The intention here has been to identify whether any elements of other forms of transportation prior to 1717 may have shaped the law and administration of the processes of transportation in 4 Geo I c. 11.<sup>12</sup> The resulting linear histories are summarised in Appendixes 1, 2, and 3.<sup>13</sup>

A third line of research seeks to identify the status of offenders transported from England prior to 1717 in order to ascertain how the concept of a property in the service of the offender complemented or altered any existing status. For example; what rights were conferred on the contractor, and what were the consequences of those rights on the transported offender? How was a transported offender treated in America and what was his or her status? Alan Atkinson considered part of this issue in his 1994 article 'The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire', in which he examined some aspects

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Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London, 1966).

<sup>12</sup> Two authors have been consulted here. The American historian Abbot Emerson Smith covered this field twice; once in an article developed from a PhD thesis and again in a revision of the earlier work in 1971. The English genealogist Peter Wilson Coldham has published extensively on all forms of emigration from England to America and usefully has summarised all forms of transportation. See Abbott Emerson Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century," *The American Historical Review* 39 (1934), pp. 232-249. Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (New York, 1971). Peter Wilson Coldham, *Emigrants in Chains: A Social History of Forced Emigration to the Americas 1607-1776* (Baltimore, 1992)

<sup>13</sup> Appendix 1 lists English and British legislation authorising transportation; Appendix 2 lists legislation permitting the transportation of the Poor, Vagabonds, and Religious nonconformists from England; while Appendix 3 lists legislation authorising transportation from Ireland.

of the status of transported convicts, both in America and in Australia.<sup>14</sup>

Atkinson's intention was to examine the nature of empire and its effects on the transportation of convicts from Britain. Atkinson confronted but, in the final analysis, offered no conclusions whether transported convicts were servants or prisoners, preferring instead to see the forces of empire as overwhelming the precise processes of the English criminal justice system.

One issue that recurs throughout the history of transportation is what exactly constituted 'transportation'? Was it just banishment or exile, or did the idea of punitive labour constitute as essential part of the process? Legislation in the 1590s contemplated abjuration and then perpetual banishment without mentioning any subsequent condition. 'Transportation' appeared in the 1650s and 1660s with labour mentioned in some provisions, but not in others. The 1717 statute 4 Geo I c. 11 utilised the formula 'property in the service of the offender' while masking the element of punitive labour, leaving it largely to colonial governments in America to resolve. The 1785 statute 25 Geo III c. 46, which reauthorized transportation from Scotland, contemplated transportation, alongside self-transportation, and banishment. The differences between transportation and banishment were hotly debated in 1794 in relation to the Scottish martyrs because of the implications on their subsequent status in New South Wales. After 1842, the concept of transportation and punitive labour was turned upside down. After first completing a period of punitive labour in an English penitentiary, offenders

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<sup>14</sup> Alan Atkinson, "The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire," *Past and Present*, 144 (1994), pp. 88-115.

were then transported or 'exiled' to Van Diemen's Land with a ticket of leave, but otherwise free to work on their own account.<sup>15</sup>

It is also necessary to recognise other differences in terminology and issues of etymology that recur throughout the history of transportation. 'Transportation' did not appear in regular legislative form until 1657.<sup>16</sup> Banishment and transportation were sometimes used interchangeably but, as will be seen later, had different meanings in England and Scotland. Contemporary statutes against religious dissenters required their 'abjuration' from the realm. Use of the prerogative sometimes appeared in the forms of 'pardons', 'respites', or 'reprieves'. Even the idea of compulsion was not entirely settled because the element of consent of the offender to his or her transportation sometimes appeared as an essential pre-condition. Consent even appeared in instances where explorers put men ashore, possibly on a voluntary basis, 'for the purposes of exploration'. The distinctions between the coercive powers of the state and elements of voluntary behaviour are sometimes difficult to differentiate with accuracy. This ambivalence remained a feature of coercive transportation even in the eighteenth century. It is argued below that words such as 'servitude' crossed the Atlantic from England to America and from America back to England, changing its meaning in the process. 'Convict' was used differently in legislation and in official correspondence and in daily usage and was later replaced, in part, by 'Prisoners of the Crown.' 'Indents' similarly were used in New South Wales to mean lists of convicts and their

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<sup>15</sup> This was not so much a change of law, but an alteration in the administration of the law. See Simpson, "Penal Servitude: Its Past and Its Future", p. 34.

<sup>16</sup> The *Interregnum Act for the better suppressing of Theft upon the Borders of England and Scotland, and for the discovery of High-way Men and other felons*, of 26 June 1657.

personal information rather than being recognised as instruments of property transfer.

Even the word of 'status' is not without difficulty. The eighteenth century English jurist William Blackstone used status interchangeably with the concept of a 'law of persons'. In breaking away from the common law approach to laws by reference to process and seeking instead to find a more systematic approach to the examination of English law, Blackstone turned to and used some medieval legal concepts to identify a range of laws covering the status of the king, master and servant, husbands and wives. Book I of his *Commentaries on the Laws of England* reflects this approach.<sup>17</sup> Some of the arguments developed in this thesis relate to the early modern English and colonial laws of master and servant, more particularly to the status of servants. In essence, this research questions the extent to which contemporary laws of master and servant helped to define the status of transported offenders. Put another way; were there aspects of the status of convicts transported to America which evolved to define the position of convicts in Australia without any English context?

Underpinning the use of status in this thesis is the question whether, within the overall concept of the status or condition of servants (or in Blackstone's approach - the rights of master and servant), a 'law of convicts' evolved? If it did, did it develop in England or in the American colonies and later in the Australian colonies? As the thesis develops, it will be argued that the circumstances whereby offenders transported from England to the American colonies were described and

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<sup>17</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (London, 1765). See also Sir William Holdsworth, *A History of English Law, Volume 3* (London, 1908, 5<sup>th</sup> ed. 1991), pp. 455-8 and Sir John Baker, *The Oxford History of the Laws of England, Volume VI, 1485-1558* (Oxford, 2003), pp. 597-627.

treated as being 'in servitude' cannot be fully explained by the application of the law of contracts but can only be understood by considering that a transported offender in America was treated with reference to some other legal framework or system of laws, that is status. In examining status, connections are drawn between the position of servants and the position (and status) of transported offenders and the coercive powers of the state, both with regard to servants and those men and women within the criminal justice system.

It has been calculated that from 1718 (when the regime of 4 Geo I c. 11 came into effect) until 1775 (when transportation to America was disrupted by the American War of Independence) some 50,000 men and women had been transported, primarily to the colonies of Virginia and Maryland where they 'were sold into servitude'.<sup>18</sup> The process of the sale of transported offenders 'into servitude' opens up further research questions. At first glance, the idea of selling a person was alien to the general understanding of the contemporary freedom of an Englishman and even suggests that some form of slavery was in use.<sup>19</sup> Was it possible that men and women under order of transportation were categorised as slaves and was the 'property in the service of the offender' provision of 4 Geo I c. 11 the statutory right which made this possible? Before 1717 allegations of slavery were brought against the government of the Protectorate.<sup>20</sup> In 1665 Chief Justice Sir John Kelyng pointed out to the justices at the Old Bailey sessions that

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<sup>18</sup> Hamish Maxwell-Stewart, "Convict Transportation from Britain and Ireland 1615–1870," *History Compass*, 8 (2010), pp. 1221–1242, at p. 1226.

<sup>19</sup> As far back at the reign of Elizabeth I, Sir Thomas Smith, Elizabeth's secretary of state, had noted that England no longer had bondmen or slaves. Mary Dewar, ed., *De Republica Anglorum* (Cambridge: 1982), p. 141.

<sup>20</sup> In March 1659 the House of Commons considered a petition from Marcellus Rivers and Oxenbridge Foyle claiming to have been sold into slavery on Barbados. See 'The Diary of Thomas Burton: 25 March 1658–9' Volume 4: March–April 1659 (1828) pp. 254–273. URL: <http://www.british-history.ac.uk/report.aspx?compid=36939> Date accessed: 20 June 2010.

transported offenders were not sent to America 'as perpetual slaves'.<sup>21</sup> Sir Francis Forbes, the chief justice of New South Wales, never really satisfied the House of Commons Select Committee in 1837 that it was not slavery. As late as 1853, Earl Grey, a former Secretary of State for War and the Colonies, was convinced that transported convicts who were assigned as servants prior to the late 1840s, 'were in fact slaves, and there is only too painful proof that in many instances the evils inseparable from slavery were experienced.'<sup>22</sup> Or were some other conventions, legal or otherwise, in operation in England or in the American colonies, or both, which made it possible for people in the circumstances of transported offenders to be sold? In the literature, the fact that transported offenders were 'sold' is mentioned without analysis. In this thesis it will be argued that the concept of 'sale' had surprisingly understandable origins, which were related closely to the status of servants.

How such a sale was made possible has rarely been addressed in the literature.<sup>23</sup> What was being sold? Was it the transported offender for the 'Term of Years' mentioned in Section I of the act? In which case, the treatment of transported offenders would suggest something akin to slavery, even if only for a term of years. Or was it the 'services' of the transported offender that was being sold? In

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<sup>21</sup> Quoted in Kelyng's Reports, 84 *English Reports*, p. 1056. Kelyng pointed out, they even accrued benefits at the completion of their term.

<sup>22</sup> Forbes; *Report of the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*. House of Commons Parliamentary Papers, 1837 (518), para. 98, p. 8, and para. 1290, p. 83. Grey Earl Grey, *The Colonial Policy of Lord John Russell's Administration*, volume II (London, 1853), p. 26

<sup>23</sup> Even the process of sale is rarely documented. The only secondary source on this matter is Frederick Hall Schmidt, "Sold and Driven: Assignment of Convicts in Eighteenth-Century Virginia," *The Push from the Bush*, 23 (1986). *The Push from the Bush* was an Australian publication and Schmidt's evidence does not appear to have been published directly in the United States of America. Schmidt's article was drawn from his 1976 PhD Dissertation which canvassed the entire processing of convicts transported to colonial Virginia. FH Schmidt, *British Convict Servant Labor in Colonial Virginia*, PhD, William and Mary College, 1976.

which case, how was such a disembodiment of offender and his or her services possible? In his 1982 analysis of slavery, the American historical and cultural sociologist Orlando Patterson remarked: ‘The distinction, often made, between selling their labor as opposed to selling their persons makes no sense whatever in real human terms.’<sup>24</sup> So, was this the ‘property and interest in the service of the offender’ that had been created by Section I of 4 Geo I c. 11 and, if so, what were the incidences of this property, other than its assignability which was implied in the act? This raises the question, which is considered in Chapters 2 and 3, whether the formula ‘property in the service of the offender’ was created by 4 Geo I c. 11, or whether 4 Geo I c. 11 was merely recognising a pre-existing practice. If so, was that practice English, colonial, or both?

In 1837, Chief Justice Forbes, pointed out that ‘It is from this right of property [in the service of convicts] that the whole authority over the convict is derived, and without it I apprehend the convict being banished, would become free.’<sup>25</sup> Sir William Holdsworth pointed out in 1924 that the criminal laws in England were applied strictly. Any failure in process or implementation would lead to defaults in the intention of the parliament and the courts.<sup>26</sup> Given the centrality then of property in the service of the offender in the punishment of transportation, it is surprising that, while it is sometimes mentioned, there has been little effort in the literature to assess its meaning or to examine its implications. Forbes and two of his contemporaries, James Stephen and Horace Twiss, all saw property in the service of the offender as the device by which the labour of transported convicts

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<sup>24</sup> Orlando Patterson, *Slavery and Social Death* (Cambridge, Massachussets, 1982), p. 9.

<sup>25</sup> *Report of the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*. House of Commons Parliamentary Papers, 1837 (518), para. 93, pp. 7-8.

<sup>26</sup> Holdsworth, *A History of English Law, Volume VI* (London, 1924, reprint 1989, pp. 629-30).



was made available to settlers in New South Wales and Van Diemen's Land.

However, their views differed as to the nature of the property right and how it was delivered to the settlers. These differing views are considered towards the end of the thesis.<sup>27</sup>

HB Simpson, writing in 1899, argued that property in the service of the offender was a remnant of the short lived 'slave' legislation of Edward VI of 1547 targeting vagabonds.<sup>28</sup> According to Simpson, later sixteenth and seventeenth century legislation had the effect of authorising ownership of the body of transported offenders, a position which did not alter until 1824 when 'property [was] no longer in the offender himself, but only in his service.' In essence, Simpson argued that prior to 1824 property in the service of the offender was, or was tantamount to, slavery.<sup>29</sup> However, Simpson only considered the position from an English perspective and failed to consider colonial practices in any detail.

Three Australian historians have examined attitudes towards the labour of convicts, with Bruce Kercher's 2003 work, "Perish or Prosper: The Law and Convict Transportation in the British Empire, 700-1850", the most comprehensive. Alan Atkinson brought a colonial perspective to bear in the examination of property in the service of the offender in relation to transportation. Atkinson assumed that the English procedures required the transportation contractors to assign convicts to the governor on arrival.<sup>30</sup> Bruce Kercher, relying on Atkinson, put the position slightly differently, stating: 'since the shipping

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<sup>27</sup> James Stephen and Horace Twiss were both lawyers at the Department of War and the Colonies. Stephen to Wilmot-Horton, 27 March 1825; 4 *HRA* 1, p. 607. Twiss to Murray, 1 December 1829; 1 *HRA* 15, p. 351.

<sup>28</sup> Simpson, "Penal Servitude: Its Past and Its Future", p. 37. Harry Butler Simpson was a senior official in the Home Department at the time; *Who was who, 1929-1940* (London, 1941), p. 1238.

<sup>29</sup> Simpson, "Penal Servitude: Its Past and Its Future", p. 42.

<sup>30</sup> Atkinson, "The Free-Born Englishman Transported", p. 108

contractors were fully paid for transporting the convicts, they retained no property right in convict labour.'<sup>31</sup> But Atkinson appears to have based his argument on the earlier assertion of Dan Byrnes to the effect that 'Legislation in 1776 had placed a commercially valuable legal entity, [which Byrnes described as 'the property in the service of the body of the convict'], wholly at the service of the Crown'.<sup>32</sup>

Both Atkinson and Kercher assumed that the transportation contractor was obligated to assign the convicts to the governor.<sup>33</sup> In 1997 Atkinson went further and took the position that 'Technically, the governor became their [the convicts'] master as soon as they stepped ashore.'<sup>34</sup> It will be demonstrated in this thesis that these conclusions are correct, but only for the period of transportation after 1824.<sup>35</sup> Had they been correct, some of the provisions of the legislation of 1824, that is the act 5 Geo IV c. 84, would have been necessary only to extend the legislative regime that was about to expire. For the period prior to 1824, Atkinson's conclusion fails to address the situation faced by Governor Hunter in 1795. It will be shown here that the process of transferring convicts to the colonial governors was more intricate than has generally been appreciated, and no allowance has been made for the situation where the assignment did not proceed properly, or at all. It is in the failure of proper process that the real status of transported convicts can best be understood.

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<sup>31</sup> Bruce Kercher, "Perish or Prosper: The Law and Convict Transportation in the British Empire, 700-1850," *Law and History Review*, 21 (2003), p. 544.

<sup>32</sup> Dan Byrnes, "Emptying the Hulks," *The Push from the Bust: A Bulletin of Social History*, 24 (1987), p. 3.

<sup>33</sup> Atkinson at p. 108 and Kercher, citing Atkinson, at p. 544.

<sup>34</sup> Alan Atkinson, *The Europeans in Australia: A History*, volume 1 (Oxford, 1997), p. 76.

<sup>35</sup> Paula J Byrne, writing in 1993, saw the legislation of 1824 as settling early conditions of labour in New South Wales. She did not consider the period before 1824. PJ Byrnes, *Criminal Law and Colonial Subject: New South Wales, 1810-1830* (Cambridge, 1993), pp. 20-5.

One final commentator deserves mention. In 1984, the Australian historian Bert Rice argued that the processes of transportation had the effect of translating offenders into indentured servants to the colonial governors.<sup>36</sup> Rice's views follow from a series of disconnected arguments and, while innovative, cannot be given too much weight. They do, however, point to the need to try to reach a clearer understanding of the role of property in the service of the offender in the transportation of offenders from Britain.

If the 'sale' of transported offenders has been rarely considered in the literature, the general context of the effects of transportation upon the transported offender has received rather more consideration, but with little elucidation. American historians such as Abbot Emerson Smith and Roger Ekirch shed light on the personal aspects of transportation. Smith analysed both the system of transportation and the characteristics of individual offenders. Ekirch examined only those offenders transported after 1717 and considered the individual contributions of transported offenders to the society into which they were placed.<sup>37</sup> Morgan and Rushton point out the close connection between banishment and transportation and the overlap between the two, especially from Scotland.<sup>38</sup> A more useful analysis is provided by Alan Atkinson. Writing in 1994 Atkinson posed the question whether transportation was the punishment of banishment alone, or whether banishment also required that the offender simultaneously

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<sup>36</sup> Bert Rice, "Were the First Fleet Convicts Bond or Free?," *Journal of the Royal Historical Society of Victoria*, 55 (1984), pp. 46-7.

<sup>37</sup> Smith, *Colonists in Bondage*; and Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford, 1987).

<sup>38</sup> Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London, 2013). Chapter 2, pp. 29-42.

underwent labour for the benefit of a third party.<sup>39</sup> This was the same question that underpinned the transportation of the Scottish Martyrs. After a careful analysis of the circumstances, Atkinson concluded that ‘servile bondage’ was an essential part of the punishment of transportation.<sup>40</sup> He went on to state this conclusion in an attenuated, but otherwise unexplained, form suggesting that transported offenders had the ‘dual status of convicts abroad, as transported British criminals, and as indentured American servants’.<sup>41</sup>

Atkinson related the practice of transportation with the evolution of the British Empire. His important insight was to note the inability of Britain properly to control activities within its expanding empire before the latter part of the eighteenth century. Using the analogy of the extending ‘imperial’ criminal justice system, rather than military hegemony or mercantilism, Atkinson argued that ideology and increasing sophistication in the efficiency of government was more relevant in the management and transportation of offenders than the legal niceties and jurisdiction of English institutions. Some of Atkinson’s conclusions are contested in this thesis yet his work is important first, in providing an analysis of the circumstances attendant upon the transportation of offenders to America, emphasising the similarity between sold convicts and sold indentured immigrant servants, tending towards the ‘degradation’ of the former after the 1740s and their assimilation with African slaves.<sup>42</sup> Second, Atkinson points to how this was applied in New South Wales, especially in the aftermath of the Bigge Report in 1822. In America, only the work of F H Schmidt (mentioned earlier) made any

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<sup>39</sup> Atkinson, "The Free-Born Englishman Transported."

<sup>40</sup> Atkinson, "The Free-Born Englishman Transported", p. 97.

<sup>41</sup> Atkinson, "The Free-Born Englishman Transported," p. 98.

<sup>42</sup> Atkinson was careful to note the different approaches adopted in Virginia and Maryland.

analyses of the processes of the circumstances of transported offenders. Even the American legal historian, Richard Morris, in his detailed evaluation of the growth of American labour law, while mentioning the proximity of transported convicts with indentured servants and his claim to have examined many thousand local cases, touched only lightly on any detail.<sup>43</sup> The most recent work in this field by Jennifer Jeppesen perceptively refers to the 'hidden' convict.<sup>44</sup>

During the disruption brought about by the refusal of an independent United States of America to permit the resumption of the transportation of English offenders to America after 1775, new measures had to be put in place to manage those waiting transportation. The development of the hulks in London and later in Portsmouth has been well documented.<sup>45</sup> During this period, the circumstances of offenders ordered for transportation and, therefore, non-capital felons being detained in England and utilised in labour operating from the river hulks on the Thames and in Portsmouth entered into British consciousness (and law) for the first time. While the act of 1719 (6 Geo I c. 23, the supplementary act to 4 Geo I c. 11) had granted custodial powers to the contractor to take offenders to the ports for transportation, the operation of the hulks in England needed to address the custody of offenders within England, but outside a gaol. How was this managed and what steps did the British authorities take that would have an impact upon the status of those people awaiting transportation or, indeed, upon those for whom the punishment of transportation had become impossible? This problem was resolved

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<sup>43</sup> Richard B Morris, *Government and Labor in Early America* (New York, 1946), pp. 310-37.

<sup>44</sup> Jennifer Jeppesen, "Searching for the Hidden Convict in Virginia's Servant Laws," in *ANZLHS E-Journal* (2013).

<sup>45</sup> See, for example, Beattie, *Crime and the Courts in England 1660-1800* pp. 565-8. For a more radical view of the hulks, particularly their administrations, see K.M. Dallas, "Slavery in Australia - Convicts, Emigrants, Aborigines," *Tasmanian Historical Research Association, Papers and Proceedings*, 16 (1968), pp. 61-76.

in August 1786 when the British government made the decision to transport offenders to Botany Bay in New South Wales.<sup>46</sup> Under the arrangements set in place some 160,100 men and women were sent to New South Wales, Van Diemen's Land and Western Australia before transportation ended in 1868.<sup>47</sup> It is not generally appreciated that transportation to Western Australia was differently based, and did not rely on the concept of 'property in the service of the offender'.

While transported offenders sent to America had been sold into servitude, what did the altered circumstances of a colony intended to accommodate transported offenders mean to the status of those offenders? Unlike America, according to historians of colonial Australia, transported offenders, now designated as 'convicts', were either 'assigned' to settlers or retained in the service of the colonial government. New South Wales and, after 1803, Van Diemen's Land, were treated as prisons and the convicts were prisoners until their term of years had elapsed or they were pardoned (conditionally or unconditionally) by the colonial governor.<sup>48</sup> But does this rather well-worn image of colonial Australia coincide with the evidence? If transported convicts were prisoners, were New South Wales and Van Diemen's Land prisons? And, if they were, by what authority were they so constituted? The evidence considered later in this thesis challenges these accepted impressions of colonial Australia, at least until the 1820s. This evidence stems from the processes put in place with respect to

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<sup>46</sup> Lord Sydney to the Lords Commissioners of the Treasury, 18 August, 1786, *Historical Records of New South Wales* Volume 1, Part 2 (Sydney, 1892), p. 14.

<sup>47</sup> Bateson, *The Convict Ships 1789-1868*, p. 380. AGL Shaw dispute Bateson's figures. See Shaw, *Convicts and the Colonies*, p. 361. The accuracy of the number actually transported is not material to this research. For the most recent account of numbers see Maxwell-Stewart, "Convict Transportation from Britain and Ireland 1615-1870", pp. 1224-1226

<sup>48</sup> Shaw, *Convicts and the Colonies*, pp. 30-1.

transportation to New South Wales and Van Diemen's Land to implement the 'property in the service of the offender' mentioned by Governor Hunter in 1795.

Material used in thesis has been drawn from a range of sources. Government papers were viewed at the National Archive at Kew, the State Records of New South Wales at Kingswood, and the Tasmanian Archive and Heritage Office in Hobart. Many original documents are now available online through institutional websites or have been published in the *Historical Records of New South Wales* and Series 1, 3, and 4 of the *Historical Records of Australia*. The various *Calendars of State Papers* collections facilitated access to government papers. The Anglo-American Legal Tradition website proved invaluable in accessing the minutes and proceedings of the Privy Council.<sup>49</sup> Three online databases were also useful: the Queen's University Belfast data base provided an excellent gateway into the Irish transportation legislation.<sup>50</sup> The University of Wollongong has a useful statistical database of the convicts transported on the First Fleet.<sup>51</sup> Finally, the Queensland State Library maintains an excellent list of convicts transported to Australia.<sup>52</sup> Generally, however, data on convict sentences, whether on websites or in published anthologies of convict histories, invariably reflects the status of transported convicts in terms of English law and practice, without regard to the sentencing realities, especially those convicts sentenced in Scotland. This is considered in Chapter 6.

The general issue of transportation received very little contemporary consideration in the English courts. This should not surprise. Criminal trials at the assizes or the

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<sup>49</sup> <http://aalt.law.uh.edu/>.

<sup>50</sup> [http://www.qub.ac.uk/ild/?func=simple\\_search](http://www.qub.ac.uk/ild/?func=simple_search).

<sup>51</sup> <http://firstfleet.uow.edu.au/search.html>.

<sup>52</sup> <http://www.convictrecords.com.au/>.

Old Bailey, while they may have led to appeals for clemency, almost never went on appeal to higher courts, although some cases were referred to other judges for consideration. As a result, there was almost no judicial discussion about the legal rationale for transportation, its implementation, or effects.<sup>53</sup> Some early calendared court records from the seventeenth century enabled the early use of transportation to be examined, but any detailed research into later court records went beyond the scope of this thesis.<sup>54</sup> The circumstances of the Scottish Martyrs (in 1793 and 1794) were discussed extensively in both the parliament and the press, but this was an exception. A small body of case law exists in New South Wales and Van Diemen's Land but these focussed generally on the minutiae of colonial processes; the *Jane New Case* in New South Wales in 1828, which is considered in Chapter 8, was a rare exception.

Contemporary legal writers were somewhat more productive, particularly in their perceptions as to the operation of the transportation system. Prime sources here were the works of Hale, and Blackstone, who provided an English perspective. Transportation from Scotland was conceived somewhat differently. The Scottish writers Hume, Alison, and Cockburn provided different perspectives to the peculiarly Scottish approach to transportation.<sup>55</sup> All authorities simply addressed

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<sup>53</sup> An examination of the 176 volumes of the *English Reports – Full Reprint* (Edinburgh, 1900-1930) identified few mentions of transportation or the status of transported convicts.

<sup>54</sup> One area of research should be acknowledged here. The English genealogist and researcher Peter Wilson Coldham conducted extensive research into records of transportations from the British Isles to America (in effect; from 1607 to 1775). His focus was on the identity of individual convicts, their offences, and their sentences but not the system of transportation itself. For the purposes of this thesis, Coldham's work provides corroboration as to numbers, but not as to method. PW Coldham, *The Complete Book of Emigrants 1607-1660* (Baltimore, 1987) and *More Emigrants in Bondage 1614-1775* (Baltimore, 2002).

<sup>55</sup> Matthew Hale, *Pleas of the Crown: Or a Methodical Summary of the Principal Matters Relating to That Subject*, 5th ed. (London, 1716); Blackstone, *Commentaries on the Laws of England*. David Hume, *Commentaries on the Law of Scotland, Respecting Trials for Crimes*, volume 2, (Edinburgh, 1800); Archibald Alison, *Principles of the Criminal Law of Scotland* (Edinburgh,



transportation as a punishment for crime and did not see it as a process in itself. Scottish authorities understood the differences in Scots law between banishment *per se* and transportation as evidenced in the parliamentary debates in 1794 of the transportation of the Scottish Martyrs. Only one, John MacLaurin, a Scottish judge, addressed the subsequent status of transported offenders in 1794.<sup>56</sup> The other contemporary British commentator was Jeremy Bentham, who voiced his criticisms of some aspects of transportation in 1802.<sup>57</sup>

While there is an extensive literature on transportation, discussion on the status of transported convicts is distinctly limited. Again, this should not surprise. In the literature, broadly speaking, transportation is seen either as transportation *from* Britain, or transportation *to* America or Australia. Other than the works of Atkinson and Kercher mentioned earlier, overviews of the entire system are rare.<sup>58</sup> Transportation from Britain is seen as one more weapon in the criminal justice response to serious crime and as more or less entire in itself without consideration of what happened to convicts in the country of destination. No examination has been made of the need for process or of the possibility of process failure. JM Beattie has provided the most detailed assessments so far of the evolution of transportation within the English criminal justices system, while Herrup and Innes examine the origins of the process of pardon and expand on the place of

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1832); and Henry Lord Cockburn, *An Examination of the Trials for Sedition Which Have Hitherto Occurred in Scotland*, volume 1 (Edinburgh, 1888).

<sup>56</sup> Scottish judges, who were not peers, took the judicial title of 'Lord'. John MacLaurin's was Lord Dreghorn. He is referred to in this thesis as John MacLaurin. John MacLaurin, "Of the Punishment of Transportation," in *The Works of the Late John MacLaurin* (Edinburgh, 1798).

<sup>57</sup> Bentham's criticisms are contained in the introduction to Jeremy Bentham, "A Plea for the Constitution," in *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1838).

<sup>58</sup> Maxwell-Stewart, "Convict Transportation from Britain and Ireland 1615–1870".

transportation.<sup>59</sup> WF Craies provided a systematic overview of compulsory expatriation but, while mentioning the arrangement associated with property in the service of transported offenders, did not consider its ramifications.

Transportation *to* America from Britain has generated its own literature. Abbot Emerson Smith provided the first detailed analysis of processes within England whereby offenders were sent from England to America. Smith's examination of the early English devices remains largely unchallenged.<sup>60</sup> Only Schmidt (mentioned earlier) looked at the processes of transportation within America itself, describing in detail the processes of disembarkation.<sup>61</sup> However, like other American writers on the early history of colonial America and even the evolution of American labour law, Schmidt drew no conclusions about how servitude was constituted or how it was made to apply to transported convicts. Rushton and Morgan's recent works on the criminal Atlantic have provided greater detail, including details of transportation within the American colonies, but they do not consider the role of property in the service of transported offenders.<sup>62</sup>

Transportation to Australia has its own evolving bibliography, but little of this has been concerned with the legal processes surrounding transportation, preferring to

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<sup>59</sup> Beattie, *Crime and the Courts in England 1660-1800*; JM Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford, 2001); Cynthia Herrup, "Punishing Pardon: Some Thoughts on the Origins of Penal Transportation," in *Penal Practice and Culture, 1500-1900, Punishing the English*, ed. Simon Devereaux and Paul Griffiths (Basingstoke: Palgrave Macmillan, 2004); and Joanna Innes, 'The Role of Transportation in Seventeenth and Eighteenth-Century English Penal Practice', ed. Carl Bridge, *New Perspectives in Australian History* (London, 1990).

<sup>60</sup> Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century", and Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776*.

<sup>61</sup> FH Schmidt, "British Convict Servant Labor in Colonial Virginia" (William and Mary College, 1976) and FH Schmidt, "Sold and Driven".

<sup>62</sup> Gwenda Morgan and Peter Rushton, eds., *Rogues, Thieves and the Rule of Law: The Problem of Law Enforcement in North-East England, 1718-1800* (London, 1998); Gwenda Morgan and Peter Rushton, *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* (Basingstoke, 2004); and Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London, 2013).

examine the voyages, the treatment of convicts, and the demographic nature of transportation. While characterisations about the early colony of New South Wales and convicts abound, the role of the assignment of the transportation contractors' property in the service of the convicts to the colonial governor has rarely been considered. Manning Clark, for example, did not mention it, and AGL Shaw mentioned assignment only in terms of assignment from the governor to settlers, rather than from the contractor to the governor.<sup>63</sup> Shaw's approach was reasonably based. Even two members of the High Court of Australia in their histories of Australian law assumed that everything necessary had been done for the effective transportation of convicts to early New South Wales; they faced no evidence to the contrary.<sup>64</sup> The most recent additions to the literature, two recent works by Alan Frost, purporting to be 'the real story' of the First Fleet and Botany Bay miss some of the relevant detail altogether. This thesis attempts to add to the literature by demonstrating that the reality of transportation was more process bound than has previously been considered in the literature, and those processes sometimes failed.

The thesis is presented in eight chapters. Chapters 1 and 2 present introductory materials. Chapter 1 is not about transportation as such. It examines the relationship between master and servant, first in England and then in Virginia. It also considers the binary relationship between contract and the coercive powers of the state which intruded into the relationship of master and servant in both England and Virginia. Aspects of those coercive powers and their connection with

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<sup>63</sup> CMH Clark, *A History of Australia I: from the Earliest Times to the Age of Macquarie* (Melbourne, 1962) and AGC Shaw, *Convicts and the Colonies*, pp. 67, 69-70, 72.

<sup>64</sup> H.V. Evatt, "The Legal Foundations of New South Wales," *Australian Law Journal*, 11 (1938), pp. 409-38; and Sir Victor Windeyer, "A Birthright and an Inheritance," *Tasmanian University Law Review*, 1 (1962), pp. 635-69.

transportation are further examined in Chapter 2, which considers the experiments in the use of transportation before 1717. These experiments included legislation and the use of prerogative powers to expatriate offenders from England.

Having set the context, Chapter 3 then sets out an analysis of the 1717 legislation, its immediate antecedents, and its subsequent implementation up until the end of transportation to America in 1775. This analysis focuses on the origins of the use of ‘a property in the service of the offender’, particularly in the circumstances surrounding the aftermath of the 1715 Rebellion. Chapter 3 also follows the progress of subsequent English measures with respect to transportation up until 1784 with the enactment of replacement legislation.

Chapter 4 considers the use of ‘property in the service of the offenders’ in the context of the decision to transport convicts from England to New South Wales. Events in London over the winter of 1786 and 1787 established a complex series of processes intended to place transported convicts in New South Wales into servitude. It will be demonstrated that the processes put in place were so complex as to invite failure. Chapter 4 looks at the main elements of those processes, their failures, and remedial action taken in London up until the 1820s.

If process failure was an early issue with respect to convicts transported from England, then the circumstances of convicts transported from Ireland after 1791 posed different issues for colonial, London, and Dublin authorities as well. These issues are examined in Chapter 5, which also includes a brief history of Irish transportation in order to demonstrate that the concept of ‘a property in the service’ of transported offenders was not the only device utilised in the British Isles to enable transportation. Chapter 6 looks at the third example of process

failure with respect to transportation; this is the circumstances surrounding the transportation of offenders from Scotland.

If the transportation of some convicts from England, Ireland, and Scotland was marked by process failures, the question that then needs consideration is what was the response of the colonial authorities in New South Wales? Did New South Wales develop its own law of convicts? This issue is examined in Chapter 7. Chapter 8 looks at the enactment of the 1824 legislation 5 Geo IV c. 86, particularly with regard to the status of transported convicts. Chapter 8 concludes with a brief Epilogue summarising the final legislative approaches to transportation from the United Kingdom and the status of transported offenders.

## Chapter 1: Two Indentures

In September 1619 and July 1628 two indentures were entered into in England for labour in Virginia. On 7 September 1619, Robert Coopy ('husbandman') of North Nibley, Gloucestershire, undertook to serve a syndicate led by Sir William Throckmorton to develop the Berkeley Plantation in the new colony of Virginia.<sup>1</sup> On 1 July 1628, Edward Hurd, ironmonger of London, agreed to transport John Logward (husbandman) of Surrey to Virginia where Logward would serve for the term of four years.<sup>2</sup> Unlike the Gloucestershire syndicate, Edward Hurd was not even represented as having any interest in Virginia against which the terms of the indenture could be implemented. The two indentures, and the differences between them, constitute essential evidence of the nature of the emerging labour market in colonial Virginia. They provide a key to an understanding of the evolution of the concept of 'servitude' in colonial America and the subsequent treatment of offenders transported from England and Ireland. They also record the shift that occurred in Virginia in the adoption of English law about the relationship of master and servant. In order to understand the nature of these two indentures and their significance, it is necessary to consider three questions: first, what did the law of England say about the relationship of master and servant at the beginning

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<sup>1</sup> The text of the indenture is set out in Susan Myra Kingsbury, *The Records of the Virginia Company of London*, vol. III (Washington, 1906), pp. 122-30. The text of the Coopy indenture forms part of 'Smyth of Nibley Papers' now housed in the New York Public Library. Some of these documents provide a useful description, not only of the formation of the syndicate, but also of the utilisation of labour in early Virginia. Extracts of the Papers are available online at <http://www.nypl.org/sites/default/files/archivalcollections/pdf/smyth.pdf> Accessed 9 July 2102. The Papers were written or collected by John Smyth (1567-1640), from Nibley in Gloucestershire, England, who was one of the original promoters of plantations and settlements in the second Virginia colony in North America.

<sup>2</sup> The text of this indenture is set out in *Virginia Carolorum* (E.D. Neill, Albany, 1896), p. 57. Ballagh notes 'An indenture of 1628, made after the assignments of contracts were recognized in Virginia, may be taken as typical. Ballagh appears to be referring to the operation of the 1619 Act of the House of Burgesses which is considered below. See James Curtis Ballagh, *White Servitude in the Colony of Virginia: A Study of the System of Indentured Labor in the American Colonies* (New York, 1969), footnote 3 on p. 34.

of the seventeenth century? Second, what was the nature of the foundation of the colony of Virginia which gave rise to the two indentures? Third, what happened to the English law of master and servant once it crossed the Atlantic?

Turning to the first inquiry: what did the law of England say about the relationship of master and servant at the beginning of the seventeenth century? In 1585 the text *De Republica Anglorum* was published in England. *De Republica* had been written by Sir Thomas Smith a civil law scholar, diplomat and, between 1572 to 1576, Secretary of State to Elizabeth I. Smith died in 1577, before the publication of *De Republica Anglorum*, but the text remained in print until the 1640s, underscoring its contemporary application.<sup>3</sup> Smith presented alternative views of England, its society, and the operation of its laws. The first view was hierarchical, with the monarch at the top of the society, descending first to the nobility (greater, then lesser), then to knights, gentlemen, squires and yeomen (reflected in urban society by citizens and burgesses).<sup>4</sup> Beneath this hierarchy was what Smith referred to the 'fourth sort of men which do not rule'. Into this stratum Smith placed day labourers, poor husbandmen, merchants or retailers who have no free land, copyholders, and all artificers. Smith did concede, however, that in rural communities even the 'fourth sort of men' carried out civic duties such as church wardens and constables. While Smith recognised the existence of the towns and boroughs, his model was essentially rural and reflected the demography of the

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<sup>3</sup> Mary Dewar ed. *De Republica Anglorum* (Cambridge, 1982). See also Ian W. Archer, 'Smith, Sir Thomas (1513–1577)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008. [<http://www.oxforddnb.com/view/article/25906>, accessed 7 June 2012].

<sup>4</sup> Dewar, ed., *De Republica Anglorum*, Book I, Chapters 16–24, pp. 64–77. This hierarchical approach was utilised two hundred years later by William Blackstone in his *Commentaries on the Laws of England* in 1765.

time, but failed to identify the increasing urbanisation of early modern England and its impact upon his hierarchical viewpoint.<sup>5</sup>

Smith also offered a second, societal, view of early modern England. This view centred on the household or family presided over by a married man, and included his wife, children, and servants, his cattle and his property.<sup>6</sup> Of interest to this thesis are Smith's views about servants contained in Chapter eight of Book III and their obligations to their masters.<sup>7</sup> Smith dismissed the idea that any form of contemporary bondage to land or person still existed in England, while noting the exceptional position of apprentices. He differentiated the position of a bonded slave as described in Roman Law from that of an English apprentice, pointing out that an apprenticeship 'is but by covenant, and for a time'.<sup>8</sup> The position of apprentices becomes relevant below. The general picture of servants was painted by Smith in the following terms:

Besides apprentices, others be hired by the yeare for wages, and be called servaunts or serving men and women throughout the whole Realme, which be not in such bondage as apprentices,<sup>9</sup>

Depending whether they were married or single, servants would be required to serve for one year, either by covenant or by law, meaning under the threat of coercion by the justices.

While employment constituted the normal picture of society, the contemporary anxiety about the unemployed was expressed by Smith in the following terms:

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<sup>5</sup> In 1571 the population of England was around 3.7 million which was almost entirely rural. The three largest towns were London with around 60,000 people, Norwich with 12,000 and Bristol with 10,000. John Guy, *Tudor England* (Oxford, 1988), p. 32.

<sup>6</sup> Dewar, ed., *De Republica Anglorum*, Chapter 11, pp. 58-9.

<sup>7</sup> Confirming the proximity of the law of master and servant with that of laws applicable to family and households described in Otto Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment," *Law Quarterly Review*, 93 (1977), pp. 508-28.

<sup>8</sup> Dewar, ed., *De Republica Anglorum*, p. 141.

<sup>9</sup> Dewar, ed., *De Republica Anglorum*, p. 144.



And if any young man unmarried be without service, he shalbe compelled to get him a master whom he must serve for that yere, or else he shalbe punished with stockes and whipping as an idle vagabond. And if any man married or unmarried, not having rent or sufficient to maintaine himselfe, doe live so idely, he is enquired of, and sometime sent to the gaole, sometime otherwise punished as a sturdie vagabond: so much our policie doth abhorre idlenesse.<sup>10</sup>

Smith's concern here reflected his hierarchal view of society and the need for subordination of labourers to societal norms and stressed the proximity by subordinating behaviour and the punishment of those who failed to conform.

Smith justified this approach by arguing: 'So that all youth that hath not sufficient revenues to maintaine it selfe, must needs with us serve, and that after an order as I have written.' But he went on:

Thus necessitie and want of bondmen hath made to use free men as bondmen to all servile services: but yet more liberally and freely, and with a more equalitie and moderation, than in time of gentilitie slaves and bondemen were woont to be used, as I have said before.<sup>11</sup>

Perhaps unconsciously, Smith had described a social and legal structure which could, at the same time, claim to be free of slaves and bonded men, but in which labourers could be coerced by law, administered by the justices of the peace, to labour for one year for anyone who wanted servants; and at wage rates also fixed by the justices. Four hundred years after Smith, the American historian Robert Steinfeld was to rationalise this apparent dichotomy in the concept of 'unfreedom'.<sup>12</sup> As in the case of the apprentice, entry into husbandry or other forms of service was voluntary. But behind the freedom to contract was the coercive power of the justices to force employment.

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<sup>10</sup> Dewar, ed., *De Republica Anglorum*, p. 141.

<sup>11</sup> *Ibid.*

<sup>12</sup> Robert J Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill, 1991), pp. 3, 5. In 2008 another American historian, A.L. Beier, characterised the early modern labour laws of England as creating modern form of serfdom. A.L. Beier, "A New Serfdom", *Labor Laws, Vagrancy statutes, and Labor Discipline in England, 1350-1800*, in AL Beier and PR Ocobock, eds. *Cast Out: Vagrancy and Homelessness in Global and Historical Perspective* (Athens, Ohio, 2008), pp. 35-83.

In 1562, the year that Smith first went as ambassador to Paris, Elizabeth I's second parliament passed *An Acte towching dyvers Orders for Artificers Labourers Servantes of Husbandrye and Apprentises*. This was the statute 5 Eliz I c. 4, usually referred to as the Statute of Artificers. The statute codified laws and practices reaching back to the 1350s and framed the English statute law of master and servant until the first half of the nineteenth century.<sup>13</sup> Of relevance to this thesis is the proximal relationship that Sir Thomas Smith described between the law, the freedom of labour (or unfreedom) in the context of the coercive power of the state, and the punishment of those labourers who were disinclined to labour at all or were disinclined to labour at the wage rates set by the justices.

The Statute of Artificers addressed two broad principles; one was the control of the labour supply, the other was the performance of work by servants or what The American historian AL Beier described as 'discipline'.<sup>14</sup> Labour controls were achieved through the justices in local sessions setting wage rates. Terms of labour hirings were set once a year in specified trades, and a quarter of a year notice was necessary (from either side) for termination. The approval of the justices could be required.<sup>15</sup> Minimum work hours were set, and unemployed labourers could be required to complete compulsory work, for example, at the time of harvesting.

Written testimonials were made compulsory to allow labourers to move between

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<sup>13</sup> The statute of Artificers was not repealed until 1813. See the statute 53 Geo III c. 40. It was still in place when New South Wales was first settled. A useful summary about the formulation of the statute is contained in Donald Woodward's 'The Background to the Statute of Artificers: The Genesis of Labour Policy, 1558-63', *The Economic History Review*, New Series, Vol. 33, No. 1 (Feb., 1980), pp. 32-44. Stanley Bindoff provides a useful analysis of the awkward passage of the legislation through the parliament, affirming that the final legislation was devised by the legislature, and not by the government. ST Bindoff, 'The Making of the Statute of Artificers', in *Elizabethan government and society : essays presented to Sir John Neale*, ed. ST Bindoff, J Hurstfiels, and CH Williams, (London, 1961), pp. 56-94, at pp. 92-3. Beier described the statute as 'the most thorough piece of legislation governing labor in modern England.' Beier, 'A New Serfdom', p. 45.

<sup>14</sup> Beier, 'A New Serfdom', p. 45.

<sup>15</sup> Ann Kussmaul, *Servants in Husbandry in Early Modern England* (Cambridge, 1981), pp. 60-1.

masters and from place to place. At the same time, the justices were empowered to punish servants who failed to turn up for work, or for refusing to work. Justices also had the power to approve dismissals and could punish masters who enticed labourers away from current employment. Marxist historians, such as Douglas Hay, argued that by handing arbitral powers to the justices meant, in effect, that the judicial control of labour, including the means to control wages, and hence the cost of labour, passed into the hands of representatives of the landowners, hence the masters.<sup>16</sup> The powers of the justices to control the cost and availability of labour sat alongside the power of the justices to control and punish vagabonds considered in Chapter 2.<sup>17</sup> The supervisory powers of the justices included the power to order the whipping of insubordinate servants, abatement of wages, and imprisonment for servants who breached their contracts.<sup>18</sup>

The Statute of Artificers also reflected the categorization of labour that had emerged during the sixteenth century according to the circumstances of their employment. Servants in domestic service were differentiated from those in agrarian work. While agrarian workers could be further differentiated between servants in husbandry who were engaged on contract for one year, or labourers who were engaged for weekly, or even daily, hire.<sup>19</sup> While the distinctions between workers differed over time and from place to place, servants, both domestic and those in husbandry, were usually young, hired by the year, and lived in the household of the master. In order to ensure their availability for the harvest, agricultural workers were sometimes only paid at the end of their term of

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<sup>16</sup> Douglas Hay in 'England, 1562-1875: The Law and Its Uses', in Douglas Hay and Paul Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: 2004), pp. 59-116, at p. 63.

<sup>17</sup> Beier, 'A New Serfdom', pp. 46, 47-9.

<sup>18</sup> Section VI and see Hay, 'England, 1562-1875', p. 67.

<sup>19</sup> See Sections III and IV.

employment. This could disadvantage a worker if the harvest was poor or wages were in arrears. Labourers, on the other hand, were often hired by the day, might be married and might live at home and work for several masters.<sup>20</sup> In some industries contractual practices differed from the Statute, or developed regional or occupational variations. Some industries relied upon written contracts (such as seamen), while others did not. Skilled tradesmen could ensure security by demanding written contracts for periods longer than one year which were actionable before the courts.<sup>21</sup>

By 1562 two additional classifications of workers were also recognised; artificers and apprentices. Artificers could be servants, but also masters in their own right in that they might be qualified tradesmen or craftsmen. Apprentices, on the other hand, as Sir Thomas Smith pointed out, were bound by indenture to serve a master for a term of years in return for being taught a trade. The Statute of Artificers adopted the London practice of setting the standard length of service for an apprentice at seven years. Apprentices could also be of two different classes. The first were voluntary apprentices whose obligations generally arose from negotiations between parents or guardians of youths (men and women) in their mid-teens who desired to learn a craft. The conditions of apprenticeships were often pre-determined by the craft Guilds. Under these arrangements the apprentice master maintained the apprentice with food, clothing, and housing and, in return could retain any earnings of the apprentice.<sup>22</sup> During the term of the apprenticeship the apprentice was required to serve the master faithfully.

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<sup>20</sup> Hay, 'England, 1562-1875', pp. 63, 66.

<sup>21</sup> Hay, 'England, 1562-1875', pp. 68-9.

<sup>22</sup> Hay, 'England, 1562-1875', p. 65.

The second class of apprentices were in an altogether different position. These were pauper or parish apprentices caught in a system devoted more towards keeping the children of poor parents from falling onto the community (the parish) for charitable support than it was to teaching the child a trade. Some apprenticeships were compellable under the statute. Sometime pauper apprentices were simply employed in unskilled work. A pauper child of seven to eight years could be apprenticed to a master with only the approval of the parish overseer of the poor, even against the opposition of the parents. The term of a pauper apprenticeship could last until the apprentice reached the age of twenty-five.<sup>23</sup> The concept of compellable pauper apprenticeships and such apprentices being in a state of servitude, though not normally mentioned in the literature, constitutes a link in an ‘unfree’ labour market between negotiated employment and coercive employment which was to become manifest in colonial Virginia. Addressing the House of Commons Select Committee on Transportation in 1837, the chief justice of New South Wales, Sir Francis Forbes, argued that property in the service of transported offenders carried the same characteristics as the relationship between a master and his apprentice.<sup>24</sup>

Two aspects of the early modern English law of master and servant relate specifically to this thesis; first, as suggested by Sir Thomas Smith, the formation of the relationship of master and servant in England rested upon the law of contract. Second, an existing contract was exclusive to and between the parties. While the Statute of Artificers may have allowed for some element of compulsory labour as indicated above, the formation of a contract of employment, whatever

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Report from the Select Committee on Transportation: together with the minutes of evidence, appendix, and index.* House of Commons Parliamentary Papers, 1837, no. 518, para. 94, p. 8.

the form of the contract may have been, rested on the capacity of *sui generis*, that is the capacity to contract. Put another way, except as required by law, duress negated consent. Freedom to contract for personal services also arose out of the meeting of minds both of the servant and the master, each agreeing that the other was a necessary part of the intended contractual relationship. Sir John MacDonnell stated the proposition this way: 'Master and Servant both contract with regard to the personal qualities of each other. The relationship is one of personal confidence, and the one cannot compel the other to accept a third party in substitution.'<sup>25</sup>

This resulting exclusivity meant that, in England, the existence of a contract of employment, except in the case of apprentices, was subject to the usual provisions of the common law and gave no rights to either the master or the servant other than what was contained in the contract.<sup>26</sup> Importantly, neither the master nor the servant could substitute a third party into the relationship and any unexpired portion of a contract of employment would, for example, upon the death of the master, not give rise to any residual obligations on the master's estate. This was so evident that there was no English case law on the subject throughout the entire period of this thesis. The exception was the case of apprentices which was justified on grounds of public policy to protect the continued education of an apprentice in the event of the death of the master. Where the working relationship

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<sup>25</sup> Sir John Macdonell, *The Law of Master and Servant*, ed. Edward A Mitchell Innes, 2nd ed., *Being a Treatise on the Law Relating to Contracts of Service, Apprenticeship, and Employment* (London, 1908), p. 213.

<sup>26</sup> The American legal historian Warren Billings seemed to suggest that in England, in 1607, at the time of the settlement of Virginia, both apprentices and household servant 'might be sold or willed to others.' See Warren M Billings, "The Law of Servants and Slaves in Seventeenth-Century Virginia," *The Virginia Magazine of History and Biography*, 99 (1991), pp. 45-62, at p. 47. Billings cites the 1677 edition of Michael Dalton's *The Country Justice*. But Dalton makes no such assertion. See Michael Dalton, *The Country Justice: Containing the Practice, Duty and Power of the Justices of the Peace, as Well in as out of Their Sessions* (London, 1746), Chapter 58 on Labourers.

involved an apprentice, the transaction was more detailed and the relationship was to endure until the apprentice completed the necessary service and training to be admitted to the necessary level of a tradesman. After 1677 and the Statute of Frauds, contracts of over one year's duration were required to be in writing to be enforceable.<sup>27</sup>

Contracts of apprenticeship posed special difficulties because they were often made by parents or legal guardians of legal minors. Relevant to this thesis are two issues that arose from such contracts: could indentures of apprenticeship be assigned, and what happened to an apprentice on the death of the master?

Anticipating the views of Sir John MacDonnell, in 1616, in the course of deciding whether a master could send an apprentice out of England for an extended period, the King's Bench observed that the relationship between an apprentice and his master was a 'matter of great trust' and the master could not commit him to another party.<sup>28</sup> In 1640 a report of cases before King's Bench suggested that it was 'the custome of London' for a master to 'pass over' to another master within the city.<sup>29</sup> But in 1665, the custom of London was read down, obliging the master's executor to continue to support the apprentice outside London.<sup>30</sup> The court acknowledged that the obligations of the master had been assigned to the executor upon the master's death by operation of law and sufficient of the master's obligations to the apprentice passed to the executor to make the continuing obligations of the master enforceable by the apprentice against the

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<sup>27</sup> 29 Car II c. 3.

<sup>28</sup> *Coventry v. Woodhall*, Hobart 134; 80 Eng. Rep. 284. The apprentice, Rathborne, travelled to the East Indies. The dates suggest he might have been on one of the East India Company vessels that departed London in January 1614 considered in Chapter 2. The custom of London was invoked in a 1663 case; *Bowchier v. Coster*, 1 Keble, 250; 83 Eng. Rep. 928.

<sup>29</sup> March 3, 82 Eng. Rep. p. 385.

<sup>30</sup> *Wadsworth v. Guy*, 1 Keble, 781; 83 Eng. Rep. 1229.

executor. The following year an executor sought to avoid any ongoing obligation to instruct an apprentice since he, the executor, did not possess the necessary skills himself to instruct the apprentice. In the face of this problem, King's Bench, while recognising the executor's dilemma, nevertheless obliged him to find a suitable alternative placement whereby the apprentice could continue his instruction.<sup>31</sup> These seventeenth century cases were determined because the court recognised that, in London, but probably not elsewhere, it had become an occasional practice for apprentices to 'be turned over' from one master to another in order to continue further to develop the apprentice's instruction.<sup>32</sup> It should be noted that the developments in English common law permitting the assignment of indentures of apprenticeship during the seventeenth century occurred after the settlement of Virginia in 1607.<sup>33</sup>

In effect then, the laws of England with respect to servants were codified in the Statute of Artificers as supplemented by the provisions of the common law with respect to contract formation. It was axiomatic that a contract of employment was exclusive between the master and the servant and did not admit assignment to a third party, except in the narrow circumstances of indentures formed with respect to apprentices where, for public policy purposes, continuity of obligation on the part of the master's estate was permitted. Although Sir Thomas Smith never used the word, this legal relationship of a servant within a master and servant relationship or laws with respect to servants was referred to as status.

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<sup>31</sup> *Walker v. Hall*, 1 Levinz, 177; 83 Eng. Rep. 357.

<sup>32</sup> This view was consolidated in 1698 in *R. v. Peck*, 1 Salkeld, 66; 91 Eng. Rep. 61-2. The precedent of an indenture of apprenticeship is contained in Dalton's *the Country Justice*, but does not admit an assignment of the indenture. Dalton, *The Country Justice*, p. 447.

<sup>33</sup> A useful treatise on 'assigning and turning over apprentices to other masters' is contained in Matthew Bacon, *A New Abridgement of the Law*, Volume IV (London, 1798), pp. 557-62, 577-8, and 579-8.



Turning now to the question; what was the nature of the foundation of the colony of Virginia which gave rise to the Coopy and Logward indentures? In the following analysis, only circumstances in Virginia are considered because of that colony's connections to the two indentures. Other colonies in America utilised the concept of servitude but only after the period under examination here.<sup>34</sup>

On 6 April 1606, merchants from London and Plymouth with connections into the court of James I obtained a patent for the establishment of colonies in North America.<sup>35</sup> The effect of the single patent was to establish two separate companies and two separate colonies.<sup>36</sup> The circumstances of the short-lived 'Plymouth Company' and its settlement, between 1607 and 1608 at Sagadahoc at the mouth of the Kennebec River are beyond the scope of this thesis.<sup>37</sup> The 'First Colony' (i.e. Virginia) and the Virginia Company of London were both founded by merchant adventurers closely associated with England's early attempts at colonial expansion. The colony of Bermuda, founded a few years later by a small group of 'Undertakers' also associated closely with the Virginia Company was connected with the development of Virginia. Sir Thomas Smythe, the incumbent Governor

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<sup>34</sup> The American historian Richard Morris set out a useful summary of the evolution of labour laws in each of the American colonies. See Richard B Morris, *Government and Labor in Early America* (New York, 1946), pp. 401-12.

<sup>35</sup> The text of the 1606 Charter is set out in William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Legislature in the Year 1619*. Volume I (New York: 1823), pp. 57-66.

<sup>36</sup> The 'First' company was based in London and the 'Second' company was based in Plymouth. The 'First' company was to hold Virginia in 'free and common socage'. See Sir Percival Griffiths, *A Licence to Trade: The History of the English Chartered Companies* (London, 1974) See also James A Williamson, *A Short History of British Expansion: The Old Colonial Empire*, third ed. (London, 1961), p. 170. And see Chapter 8 generally, pp. 139-158. Both companies contemplated the North American coast as being Virginia. Provisions were contained in the patent to prevent territorial encroachment of one company upon the territory of the other.

<sup>37</sup> Jordan and Walsh claim that condemned Englishmen were included among the settlers. This claim is disputed in Chapter 2. Don Jordan and Michael Walsh, *White Cargo: The Forgotten History of Britain's White Slaves in America* (New York, 2008), pp. 39, 41, 42.

of the East India Company, was to play a major role in the administration of both Virginia and Bermuda for some years.

King James's charter set out that the colony was 'to make Habitation, Plantation, and to deduce a colony of sundry of our People'. This was supplemented in November 1606 with Articles, Instructions and Orders 'for the good Order and Government' of the colony which framed the administration of both the government of the colony and the administration of justice.<sup>38</sup> A second charter was granted in 1609 to an increased number of investors. A third charter was granted in 1611 authorising lotteries to raise capital for the company.<sup>39</sup> In 1609 Sir Thomas Smythe, then the governor of the East India Company, was appointed Treasurer of the Virginia Company of London, in effect the chief executive officer. Smythe was to remain in that role until 1619.<sup>40</sup>

In April 1607 some 107 settlers arrived in James Town.<sup>41</sup> In circumstances which anticipated the problematic foundation of the colony of New South Wales one hundred and eighty years later, the initial settlement was under-resourced and only barely sustainable. By the bitter winter of 1609 (the so called 'starving times') the

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<sup>38</sup> Hening, Volume I, pp. 67-76. Part of these instructions regarding the power of the respite and pardon are considered in Chapter 4.

<sup>39</sup> The text of the second charter is set out in Hening, Volume 1, pp. 80-98. The second charter reflected a significant expansion in the number of Adventurers in London naming a few hundred members. And see Article XVI of the 3<sup>rd</sup> Charter, Hening, Volume I, p. 108.

<sup>40</sup> Alexander Brown, *The Genesis of the United States*, Volume 2 (Boston, 1891), p. 74. See also Griffiths, *A Licence to Trade*, p. 166. During Smythe's tenure as Treasurer the affairs of the Virginia Company were conducted from Smythe's house in Philpot Lane, in almost exactly the same way as the business affairs of the East India Company.

<sup>41</sup> The exact number is not clear, with some authors stating the figure at 107 or 104. These were the survivors of the initial 144 who left England at the end of 1606. Virginia Bernhard summarised the conflicting evidence. See Virginia Bernhard, "'Men, Women and Children' at Jamestown: Population and Gender in Early Virginia, 1607-1610," *The Journal of Southern History*, 58 (1992), pp. 599-618.

population was reduced from some 400 settlers to a mere sixty.<sup>42</sup> The social composition of the early planters provided no basis for optimism and reflected a selection process more suited to an urban rather than a rural society.<sup>43</sup> Out of the 294 planters who arrived in 1607 and 1608 very few had the capability of turning the economy into a self-sustaining community. There were no farmers or rural workers and, of the forty-nine or so classified as 'labourers', Captain John Smith, a contemporary, pointed out that many were footmen and retainers to the nearly 120 or so 'gentlemen and councillors'.<sup>44</sup> Only the labourers displayed any eagerness to labour, but only within their discipline and for a surprising short working day. Gentlemen on the other hand – and there were lots of them – did not work in England and showed no disposition to do so in Virginia.<sup>45</sup> Despite the privations of the early settlement, and the existential threats, the planters proved to be unwilling or incapable of providing for their own survival.<sup>46</sup> This, in turn, led to one of the long-term problems of the early Virginian colony. This was a near permanent shortage of labour exacerbated, after 1614, with the arrival of the labour intensive commercial growing of tobacco.<sup>47</sup>

Under Smythe's administration, the Virginia Company of London set about re-ordering the form of colonial government in Virginia. In 1609, London concluded that the principal cause of the colony's economic problem was insufficient order

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<sup>42</sup> Bernhard, "'Men, Women and Children' at Jamestown: Population and Gender in Early Virginia, 1607-1610", p. 609.

<sup>43</sup> Edmund S Morgan, "The Labor Problem at Jamestown, 1607-18," *The American Historical Review*, 76 (1971), 595-611, at pp. 597, 605-6, 608.

<sup>44</sup> Captain John Smith, *The Travels of Captaine John Smith* Volume 1 (Glasgow, 1907), pp. 90-91, and Volume 2, pp. 486-7.

<sup>45</sup> Morgan, "The Labor Problem at Jamestown, 1607-18", pp. 608-9.

<sup>46</sup> Morgan, "The Labor Problem at Jamestown, 1607-18", p. 608.

<sup>47</sup> Griffiths, *A Licence to Trade*, p. 150. Morgan, in 'The Labor Problem at Jamestown, 1607-18', p. 608, points to the production of tobacco and its rapid monetisation as being the single event which turned the indolent plants into hard working settlers. See p. 608.

within the colony itself. At the same time, the colony was suffering from a poor press in England, which inhibited the raising of capital and the recruitment of further settlers. The response was to appoint a powerful governor-for-life, Thomas West, Lord De La Warr, to administer the colony from Virginia. He was supported by two deputies, Sir Thomas Gates and Sir Thomas Dale, who were sent to the colony to draw up new local laws better to administer the colony and bring it into profit.<sup>48</sup>

In an effort to attract investment in England, the Company published two documents indicating its colonial intentions, adopting a high moral and religious tone in the process. The *True and Sincere declaration of the purpose and ends of the Plantation begun in Virginia* was published in England while the *Laws Devine, Morall and Martiall* was proclaimed in Virginia.<sup>49</sup> In the event, the laws proved to be neither divine nor moral, but were martial. Lieutenant-Governor Sir Thomas Dale arrived in Virginia in May 1611 and quickly invoked martial law to coerce the planters, irrespective of status, to work for the company in clearing land for food production and building defences against the American Indians.<sup>50</sup>

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<sup>48</sup> Charles McAndrews, *The Colonial Period of American History*, volume 1 (New Haven, 1934), pp. 108-12.

<sup>49</sup> *The True and Sincere declaration* is available online via Early English Books Online Text Creation Partnership, September 2008: <http://name.umd.umich.edu/A14514.0001.001>. The most recent reprint is William Stracey and David H Flaherty ed. *For the Colony of Virginea Britannia. Laws Devine, Morall and Martiall, etc.* Association for the Preservation of Virginia Antiquities, 1969.

<sup>50</sup> David Thomas Konig, "'Dale's Laws' and the Non-Common Law Origins of Criminal Justice in Virginia," *The American Journal of Legal History*, 26 (1982), pp. 354-375. Reporting to London in 1611 Dale railed against the behaviour of the some 300 recent immigrants creating the impression that the 300 were transported vagabonds from England. See Dale to Salisbury, 17 August 1611, *Calendar of State Papers, Colonial Series, America and West Indies, 1574-1660*, Volume 1, pp. 11-12. This view was accepted by W.F. Craies, 'The Compulsion of Subjects to Leave the Realm', *Law Quarterly Review*, 6 (1890), pp. 388-410, at p. 398. That the 300 were vagabonds (Craies's view) is insinuated in the Calendar of State Papers summary of Dale's letter to Salisbury. But the original letter, published in Brown, *The Genesis of the United States* Volume 1 (Boston, 1891), pp. 501-8, at pp. 506-7 conveys a very different impression. Dale was, in effect,

This process took a number of years and helped the settlement to show some modicum of stability and industry by the time Dale departed Virginia for England in April 1616. The coercive use of martial law was to have a lasting effect on the labour market in Virginia. Dale created a military-style commune under which the planters were coerced to work for the common good, at the direction of the Company, and with little or no say in local administration. In effect, they were reduced to the status of servants of the Company.<sup>51</sup> Dale described their circumstances as ‘servitude’, the term previously utilised by Sir Thomas Smith to refer to the position enjoyed only by apprentices. Dale used a similar form of words in 1612 in an attempt to have the Planters engage in the construction of a new centre at Charles City. He promised relief from ‘general and common servitude’.<sup>52</sup> Was Dale importing something more than the language of mere service for a master by contract or had he imported the language of coercion from the application of martial law? In the later history of colonial Virginia the idea of ‘servitude’ was to carry a special meaning that had no equivalent in contemporary England, indicating that colonial Virginia evolved its own law of servants or status different from the comparable laws applicable in England. Servitude was to become central in defining the status of all servants imported into Virginia until the War of Independence in 1774.<sup>53</sup>

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complaining against the quality of settlers and his point was that he could do a better job with condemned men rather than unsuitable volunteers.

<sup>51</sup> Ballagh, *White Servitude in the Colony of Virginia*, p. 14.

<sup>52</sup> Ballagh, *White Servitude in the Colony of Virginia*, pp. 21 and 27.

<sup>53</sup> Lawrence M Friedman, *A History of American Law* (New York, 1973). At p. 70 Friedman points out that the special character of colonial labor law evolved from the special character of the colonial needs and conditions. Ballagh goes further, arguing that the special circumstances of the administration of the rule of the Virginia Company, its use of the common fund, and the activation of martial law by Governor Dale predisposed Virginia to acceptance of the status of servitude which came to mean the more coercive deployment of powers by a master over a servant than would have been possible in England at the same time. Ballagh, *White Servitude in the Colony of Virginia*, pp. 21-2, 26.

During 1617 and 1619 tensions in London between competing interests in the management of the Virginia Company over profitability came to a head. Under pressure from his deputy, the Puritan Sir Edwin Sandys, Smythe embarked upon a series of reforms which Sandys completed after Smythe retired as Treasurer.<sup>54</sup> Three elements of the reform program are relevant to this thesis. First, the internal governance of Virginia was liberalised. Second, new methods of land development were introduced in the colony. Third, steps were taken to increase the availability of labour. Martial law was ended in 1619, as was the servitude of compulsory communal service. A new governor, Sir George Yeardley, arrived in Jamestown in April 1619. At the end of July 1619 a General Assembly (the House of Burgesses) was convened, comprising the Governor, the Council, and two burgesses elected from each of the eleven communities, to pass laws for Virginia.<sup>55</sup> In order to increase the availability of labour in the colony, plans to increase the number of immigrants were widely advertised in England. New planters were given access to land under patents issued by the Company with the promise of further land grants in return for each additional migrant labourer they imported.<sup>56</sup> In 1619, at the time of the transfer of the Treasurership from Smythe to Sandys, the surviving population was still only around 400 people.<sup>57</sup> Under new initiatives developed by Sandys many immigrants travelled from England to Virginia in the hope of a new life and improved fortune. Unfortunately, there was no abatement to the high mortality rates. The death toll of immigrants, both at sea

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<sup>54</sup> See Wesley Frank Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (New York, 1932), pp. 47-105 for a detailed analysis of this complex dispute and its resolution.

<sup>55</sup> HR McIlwaine, ed., *Journals of the House of Burgesses of Virginia 1619-1658/59* (Richmond, 1915).

<sup>56</sup> This became known as the 'headright' system. Craven, *Dissolution of the Virginia Company*. Craven examines this process in some detail, see pp. 58-65.

<sup>57</sup> Craven, *Dissolution of the Virginia Company*, p. 94.

and in Virginia, was considerable and additional sources of labour were still required. In what was a barely legal exercise, vagrant boys and girls were rounded up from the streets of London and sent to Virginia as 'apprentices'.<sup>58</sup> These recruitment endeavours, while they touched marginally on the processes of later transportation of offenders from England, proved futile in the immediate term. Despite some four thousand immigrants travelling to Virginia under the auspices of Sir Edwin Sandys, immigrants who survived the voyage were caught up in the Indian Massacre of 1622 during which one-quarter of the population were annihilated. By the end of 1622 the population of Virginia was only about 1204.<sup>59</sup>

In May 1619 Sir Thomas Smythe was replaced by Sir Edwin Sandys.<sup>60</sup> It has been estimated that against an outlay of £67,000 in the years prior to 1619, the Virginia Company only received revenues of £66,624, which included the revenues of lotteries and loans.<sup>61</sup> The Company had been barely profitable and without the lottery revenues would have been bankrupt. Neither the administration of Sir Edwin Sandys in London, nor that of Sir George Yeardley in Jamestown could entirely solve the increasingly difficult relations between the Company and the government of James I. A series of internal disputes and allegations of embezzlement were brought by Sandys and Smythe against each other. The continued lack of profits and the extremely high mortality rates suffered by the immigrant population, either on route, or upon arrival became the final straw and

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<sup>58</sup> R.C. Johnson, "The Transportation of Vagrant Children from London, 1618-1622," in *Early Stuart Studies*, ed. H.S. Reinmuth (Minneapolis, 1970), pp. 137-151.

<sup>59</sup> Edmund Sears Morgan, *American Slavery American Freedom* (Toronto, 1975), p. 101.

<sup>60</sup> Wesley Frank Craven, *The Virginia Company of London*, (Gutenberg ed., 2009), pp. 39-40.

<sup>61</sup> W. R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies* volume II (Cambridge, 1912) quoted at Griffiths, p. 157. Griffiths and Scott point out the difficulties of trying to construct profit and loss statements or a balance sheet for an Adventure company.

put an end to the Company's life and authority.<sup>62</sup> On 24 May 1624, by order of King's Bench, the various letters patent and charters which had established the company and formalised its authority in Virginia were annulled.<sup>63</sup> Thereafter Virginia came under the direct rule of the Crown, not as a part of England or a dominion of England, but as the personal property of James I and administered by the King and his Privy Council.<sup>64</sup>

In 1619 the economy of Virginia had started to shift from being an endeavour of the Virginia Company, to being an economy operated by and for the benefit of private entrepreneurs. Sir George Yeardley's administration, in addition to granting land to the Old Planters, began to secure land for the Company's own purposes as well as developing 'particular plantations' to be operated by English syndicates formed for the purpose.<sup>65</sup> To work these Company and private lands, the Company and leading land holders started the practice of importing tenant farmers to work under the supervision of a Company agent.<sup>66</sup> These tenant farmers enjoyed some measure of share-farmer entitlements, paid quit-rents, and were supposed to earn entitlements to land grants at the end of the term of their tenancy. It was into this environment that the Throckmorton syndicate took up land within the Berkley Plantation in Virginia and the Coopy indenture was prepared in England. In summary then, despite intentions in London, the early

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<sup>62</sup> Morgan, *American Slavery American Freedom*, p. 101.

<sup>63</sup> Susan Myra Kingsbury, ed., *The Records of the Virginia Company of London*, Volume I (Washington: 1906), p. 103. See also Craven, *Dissolution of the Virginia Company*, p. 322.

<sup>64</sup> Griffiths, *A Licence to Trade*, pp. 156-7.

<sup>65</sup> Some of the leading members of the community, including Governor Yeardley acquired considerable acreage under this scheme. In July 1621, George Sandys, the brother of Sir Edwin, travelled to Virginia and took up 1500 acres. He took with him 50 tenant farmers, earning himself an additional 50 acres per tenant; 25 acres immediately, and an additional 25 acres later. Susan Myra Kingsbury, ed., *The Records of the Virginia Company of London*, Volume III (Washington: 1933), pp. 471-2. See Morgan's analysis: Morgan, *American Slavery American Freedom*, pp. 122-3. See also p. 106.

<sup>66</sup> Morgan, *American Slavery American Freedom*, p. 94.



years of Virginia were marked by repeated failures in government and an on-going critical shortage of labour. It was in this context that the Coopy indenture of 1619 and the Logward indenture of 1628 become relevant to this thesis.

Before turning to any consideration of the subsequent evolution of labour law in Virginia, however, it is useful to make brief mention of Bermuda. The islands had been discovered by the Portuguese and came into English consciousness when Sir George Somers was wrecked there in July 1609 en route to Virginia. In the following years Bermuda, abundant with wild hogs, was used as a supply base for the Virginia colony. Working pursuant to a charter from James I ‘Undertakers’, associated with the Virginia Company, landed some fifty to sixty settlers on the island on 13 July 1612 establishing a small, but fractious, community. Sixty more settlers arrived the following year. By the end of 1614 some 600 people had settled on Bermuda.<sup>67</sup> Whether offenders convicted in England were among these early settlers is not recorded in the records of the merchant companies. As will be seen in the next chapter, however, records in London suggest that offenders from the Middlesex Sessions in 1614 were being sent there. On 29 June 1615 the Undertakers, ‘aroused by the success of the Venture’, applied for and obtained from James I a new charter for ‘Somers Islands Company’.<sup>68</sup>

It is now possible to turn to the third question to be considered in this Chapter; what happened to the English law of master and servant once it crossed the Atlantic to Virginia? A comparable question was to arise in the early settlement of New South Wales after 1788.

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<sup>67</sup> Brown, *The Genesis of the United States*, Volume 2, p. 755.

<sup>68</sup> Noel E Sainsbury, ed. *Calendar of State Papers, Colonial Series, America and West Indies, 1574-1660*, Volume 1, p. 17.

The charter issued by James I to the Virginia Company of London in 1606 addressed, in part, the legal position of the colonists travelling to the new colony. Article XV of the charter specified that the English inhabitants of Virginia and any children born to them:

shall have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions.<sup>69</sup>

While this elegant formula suggested that the planters carried the rights of Englishmen with them to Virginia, it disguised a wider question of what laws were to operate within the colony. As already noted, the use of martial law between 1611 and 1619 rendered the ‘liberties’ of the planters all but illusory. The charter of 1606 suggested that the colony of Virginia was not England, hence the need for the statement in Article XV. However, while the legal and constitutional position of the colony remained undefined for some time; the Articles and Instructions provided an operable legal and governance regime in early Virginia. The legal status of the colony was not clarified until the 1701 decision of Chief Justice Sir John Holt in *Smith v. Brown and Cooper* to the effect that ‘the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases ...’<sup>70</sup> This left open the question of what were the laws in the colony of Virginia in 1607 during the initial period of settlement? Did English common law travel with the settlers to Virginia as part of their ‘liberties, franchises, and immunities’, and, if so, how were these liberties to be enjoyed?

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<sup>69</sup>Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Legislature in the Year 1619*, Volume I, p. 64.

<sup>70</sup> 2 Salk 666, 91 Eng. Rep. 566. See also Jonathan A Bush, "The British Constitution and the Creation of American Slavery," in *Slavery & the Law*, ed. Paul Finkelman (Lanham, Maryland, 2002), pp. 396-400, for an analysis of the development of the concept of prerogative laws and their application to the American colonies before 1774.

Did English statute law apply in the new colony? In particular, were the rules of master and servant as enunciated in the statute of Artificers of 1562 applicable in Virginia? Were labourers who accompanied the planters to Virginia subject to the provisions of the 1562 statute and, if so, how would it have been applied to them in 1607? A response to these questions is discernible, though never completely resolved, during the administration of the Virginia Company.

The available evidence does not give any useful descriptions of the servant class that arrived in Virginia during the early years of settlement. It is clear that some unclassified labourers had arrived during 1607, 1608, and 1611 but there is no clear evidence as to their terms of engagement; whether they were some loosely defined household retainers or tenant farmers of the planter whom they accompanied, or whether they had been engaged in England under some form of indenture along the lines utilised by the Throckmorton syndicate for Robert Coopy in 1619.<sup>71</sup> Equally importantly, there is no evidence before 1618-19 of any servants travelling to Virginia on their own account in search of employment in the colony or as the result of some prior arrangement such as became common in the form of indentures utilised after 1619.<sup>72</sup> Extensive research by the genealogist PW Coldham into the Virginian records of the time disclosed no earlier consignment of servants, other than those of the original settlement in 1607 and subsequent parties of settlers. The American historian Richard Dunn argued that the first settlers of the Virginia Company of London were all servants of the

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<sup>71</sup> Morgan considered the role of tenant farmers, suggesting – but not actually stating – that they were tenants to planters who were gentlemen. See Morgan, *American Slavery American Freedom*, pp. 106-7.

<sup>72</sup> This conclusion is drawn from an analysis of Peter Wilson Coldham, *The Complete Book of Emigrants 1607-1660*, volume 1 (Baltimore, 1987), pp.1-15.

Company.<sup>73</sup> Dunn's claim conflicts with the direct report of John Smith and should be discounted. In light of the subsequent need to deploy martial law in Virginia, it would make little sense if the planters had, in fact, been the servants of the Virginia Company all along.

Under the reforms initiated by Sir Edwin Sandys, the Throckmorton syndicate in Gloucestershire sought to employ Robert Coopy. In February 1618, the syndicate had received a patent from the Virginia Company giving access to land to develop a plantation. The patent required the syndicate to raise servants in England and transport them to Virginia. The syndicate's intermediary, a Captain Woodleefe, was to charter a vessel to take some thirty-five men to Virginia and thereafter supervise the plantation's development. By the terms of the 1619 indenture, Robert Coopy was to serve the syndicate for the term of three years from the time of his arrival in Virginia.<sup>74</sup> In return, the syndicate was to transport Coopy to Virginia 'at their cost and charge in all things, and there to maintayne him with convenient diet and apparel meet for such a servant'. At the expiry of the three years, the syndicate was to grant Coopy thirty acres of land for his life time at a rental of twelve pence per acre.

Two other documents in the Nibley Papers expand upon the transaction. One, dated 15 September 1619, contains a certificate from the mayor of Bristol noting the embarkation of some thirty-five male passengers shipped to Virginia under the auspices of Henry Penry in the *Margaret*. Only four of these passengers are

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<sup>73</sup> Richard S Dunn, "Servants and Slaves: The Recruitment and Employment of Labor," in *Colonial British America: Essays in the New History of the Early Modern Era*, ed. Jack P Greene and JR Pole, (Baltimore, 1984), pp. 157-194. Dunn also claimed that the two settlements of Sir Walter Raleigh at Roanoke were similarly manned by servants of Raleigh: p. 159.

<sup>74</sup> See footnote 1 above.

identified as ‘gentlemen’, suggesting that the rest were either tenant farmers or servants. Included among the passengers was Thomas and Samuell Coopy but not Robert. Robert’s absence becomes apparent from an undated ‘indorsement’ at the foot of the indenture of 7 September 1619. This records that Robert Coopy ‘forsook’ the voyage. There is no suggestion in the indorsement that Coopy’s forsaking the voyage was without the consent of the syndicate. In the second document in the Nibley papers, dated only ‘September 1619’, is a list of men sent to Virginia during the period. This document was later annotated by Captain John Smyth, one of the original settlers in Virginia. The annotation noted that, among others, Thomas and Samuell Coopy had both died. The fate of the Berkeley Hundred was short lived: it suffered badly during the Indian Massacre of 1622, which may explain the notation from John Smith as to the deaths of many of the party who had travelled to Virginia with Captain Woodleefe.

Two further issues are relevant to the Coopy indenture and the position of indentured servants in 1619. The Coopy indenture contained in Volume III of the *Records of the Virginia Company of London* suggests that the instrument executed by Coopy was a pre-designed form.<sup>75</sup> This could have been drafted to meet the immediate circumstances of the Throckmorton syndicate, or it may have been in more general use, suggesting that similar indentures had been in use before September 1619.<sup>76</sup> The second issue was the resolution of the inaugural session of the Virginian House of Burgesses in July 1619 requiring indentured servants to comply with their indentures. This seemed to suggest that some indentured

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<sup>75</sup> Kingsbury, *The Records of the Virginia Company of London*, Volume 3, pp. 122-30.

<sup>76</sup> Billings, "The Law of Servants and Slaves in Seventeenth-Century Virginia", p. 49.

servants already in Virginia were abandoning their indentures.<sup>77</sup> Another explanation for the resolution may have been the high rates of mortality during the early settlement period, even up to the time of the Indian Massacre in April 1622. This must have significantly disrupted any firm contractual arrangements should they have been made. It must be assumed that, on some occasions, servants would have arrived in the colony, or have found themselves, without masters. Whether the services of such servants were taken up by other planters is an unresolved question.<sup>78</sup>

The importance of the Coopy indenture of 1619 lies in the fact that, while it was drawn up and executed in England, and was therefore subject to English law, it contained a provision that would have otherwise been both unnecessary and incomprehensible in England but entirely appropriate for the circumstances of the new colony of Virginia. The terms of the indenture stated that Coopy would serve not only the syndicate, but also ‘their assignes’. It is also clear from the syndicate’s instructions to Captain Woodleefe that Coopy, and the other servants presumably engaged under similar indentures, were destined only to be engaged in the affairs of the Berkeley plantation. There was no suggestion in the indenture, or in Captain Woodleefe’s instructions, that Coopy, or his labour, might be assigned to a third party on any permanent basis. The short three year period of the indenture supports the idea that any assignment was intended only to operate for short terms to allow for the circumstances of sowing and the harvest, and to provide some flexibility against the vagaries of the seasons or, possibly, a change

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<sup>77</sup> McIlwaine, ed., *Journals of the House of Burgesses of Virginia 1619-1658/59*, pp. 10-1, 14.

<sup>78</sup> Edmund Morgan recognised this problem but used it as evidence for the period of avarice associated with the period 1619 to 1622, but not earlier. See Morgan, *American Slavery American Freedom*, p. 116.

of master from Captain Woodleefe to some other supervisor within the Berkeley Hundred. This may even have been a response to the limited flexibility of labour among the early settlers mentioned by Edmund Morgan.<sup>79</sup> By contemplating the assignment of the indenture from the syndicate to other masters in Virginia the indenture recognised how different the labour market in Virginia, was from that in contemporary England.

The Logward indenture of 1628, while similar in appearance to the Coopy indenture, was utterly different in effect and demonstrated the evolution in the form of labour contracting that had occurred since 1619. American historian JC Ballagh considered the form of the Logward indenture as being an example either of an indenture entered into by a planter resident in England or an English agent of the Virginia based planter.<sup>80</sup> In either event, the nature of the indenture and its usage had shifted from the form used by the Throckmorton syndicate in 1619. While using the language of the English law of master and servant, the 1628 indenture was being used, not with the possibility of assignment, but with that specific intention. Rather than being an instrument which created the relationship of master and servant, the indenture created an agency agreement by which Hurd would fund the cost of transportation from England to Virginia.<sup>81</sup> Upon arrival in Virginia the indenture was be assigned to a person who was to become the real master (and who might also further assign the indenture). The true nature of this transaction has not generally been recognised in the literature.<sup>82</sup> Thus, while the

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<sup>79</sup> Morgan, "The Labor Problem at Jamestown, 1607-18", p. 610.

<sup>80</sup> Ballagh, *White Servitude in the Colony of Virginia*, p. 34.

<sup>81</sup> Morgan estimates the cost of transporting a servant from England to Virginia in the period 1620 to 1624 to be around £6. Provisions and clothes for the voyage and first few years in the colony would add another £4-6. See Morgan, *American Slavery American Freedom*, pp. 106-7.

<sup>82</sup> Morris, *Government and Labor in Early America*, discussed the nature of the assignment of servants without drawing this conclusion, pp. 402-12.

1619 Coopy indenture opened the possibility of a new form of contract of master and servant in Virginia, the 1628 Logward indenture made it clear that an assignable agency agreement had become common place in the supply of labour into Virginia. In effect, the assignment provisions of an indenture for service in Virginia permitted, indeed expected, the sale of the servant's labour. Hurd was a participant in the servant trade, not acting as a recruiter for his own estates in Virginia. By the device recorded in the Logward Indenture, the English approach to the master and servant relationship was modified in Virginia by the use of agency agreements which enabled the 'sale' of the servants labour. This possibility of assignment also broke the exclusivity of undertaking that surrounded the English relationship of master and servant. Servants arriving in Virginia with indentures similar to those of Edward Logward owed a debt burden to the original 'master' in England. This burden was transferred by the process of sale to the 'master' in Virginia and the services of the servant were thus transferred 'by sale'. This change in the nature of the law of master and servant in Virginia was directly to affect the position of convicts transported to Virginia. Incidentally, Coldham's research does not list either Logward or Hurd having travelled to Virginia in 1628 (or in the period 1626 -1630).<sup>83</sup>

So, if the Logward Indenture marked the clear adaptation of the English law of master and servant to the particular circumstances of labour-diminished Virginia, how did those emerging colonial laws accommodate the arrival of offenders sent to Virginia from England? The answer to this question is difficult to respond to by evidentiary means and is wrapped up in the development of the trade in servants

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<sup>83</sup> This is deduced from an examination of Coldham, *The Complete Book of Emigrants 1607-1660*, pp. 71-93.



into Virginia generally. As will be demonstrated in Chapter 2, there is evidence from England of the despatch of English offenders to Virginia and Bermuda, although it cannot be confirmed that offenders were sent to Bermuda before 1614 and to Virginia before 1620. Alongside these measures, as the Logward Indenture demonstrated, a usually legal (and sometimes illegal) trade in servants developed and was maintained well into the mid-1700s.<sup>84</sup> But how did transported offenders get absorbed into the Virginian labour market? Despite an extensive and wide ranging bibliography on immigration into America, only one researcher appears to have tackled this question, and the research was limited to the mid-1750s and this is Frederick Hall Schmidt.<sup>85</sup> Schmidt's work is considered in Chapter 3.

Before examining the circumstances of transported offenders in Virginia, it is useful to look at the situation of servants more generally. At the first meeting of the General Assembly of Virginia in July and August 1619, after first recording its 'detestation of Idlers', the Burgesses 'ordained' that all arriving servants who had contracted themselves in England, 'either by way of indenture or otherwise' should serve out their obligations.<sup>86</sup> The issue of servants arriving in Virginia without any indentures was to be an issue of continuous concern to the Burgesses. Successive assemblies in 1642, 1657, 1661, 1666, and 1705 passed laws to the effect that servants arriving without indentures should serve for a specified term

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<sup>84</sup> AE Smith and PW Coldham both give detailed accounts of the illegal trade in servants. See Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776*; Chapters 2, 3, and 4, pp. 26-88. Coldham provides a useful summary of the position in Scotland and the complicity of local magistrates. Coldham, *Emigrants in Chains: A Social History of Forced Emigration to the Americas 1607-1776* (Baltimore, 1992), pp. 89-97.

<sup>85</sup> Frederick Hall Schmidt, "British Convict Servant Labor in Colonial Virginia" (The College of William and Mary in Virginia, 1976). Parts of Schmidt's PhD thesis was subsequently published in Schmidt, "Sold and Driven: Assignment of Convicts in Eighteenth-Century Virginia",

<sup>86</sup> McIlwaine, ed., *Journals of the House of Burgesses of Virginia 1619-1658/59*, pp. 9, 10-11, 14.

of years depending upon their age.<sup>87</sup> In 1642 men and women above twenty years of age were to serve terms of servitude of four years, if above twelve years, they were to serve terms of five years, and if less than twelve years, they were to serve terms of seven years. In 1657 the ages were adjusted: men and women above sixteen years were to serve terms of four years, while those under fifteen were to serve until they turned twenty years of age. Where the age of the servant was in dispute, courts were empowered to determine the age of a servant. In 1666 a further change was enacted. Servants aged nineteen years or above arriving without indentures were to serve for five years, while those under nineteen were to serve until they reached the age of twenty-four. This requirement was repeated in 1705.

Much of the servant legislation of the time, other than determining the duration of servitude for servants arriving in Virginia without indentures, addressed the issue of servants being poached by other masters and the perennial problem of runaways. Servants arriving from Ireland received special consideration.

Legislation of 1655 treated Irish men and women as aliens and those arriving without indentures were required to serve longer terms of servitude.<sup>88</sup> In 1657 the requirements for Irish servants was extended to 'all aliens'.<sup>89</sup> Two years later these terms were seen as a disincentive to the immigration of servants and English and alien servants were put on an equal footing with respect to the terms of

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<sup>87</sup> For 1642 see Act 16, 18 Charles I; Hening I, p. 257; for 1657 see Commonwealth Act 16; Hening I, pp. 441-2; for 1661 see Act 40, 14 Charles II; Hening II, pp. 113-4; for 1666 see Act 10, 18 Charles II; Hening II, p. 240; and for 1705 see Act 49 of 4 Anne.; Hening III, pp. 447-62 at p. 447.

<sup>88</sup> Act 6 of the 6<sup>th</sup> year of the Commonwealth, 1655; Hening I, p. 411. Those above sixteen years of age were to serve six years while those below sixteen years of age were to serve until they were twenty-four.

<sup>89</sup> Act 85 of the 9<sup>th</sup> year of the Commonwealth; Hening I, p. 471.

servitude.<sup>90</sup> Nowhere did the servant legislation make any mention of the circumstances of felons or other offenders transported from England. So how was the position of convicts arriving in Virginia determined?

The simple response to this question is; it is not clear and there is little elucidation in the literature. Two American writers have addressed the issue of convicts as servants more generally, but with little substantial clarity. In 1895 the American historian JC Ballagh wrote a history of ‘white servitude’ in order to differentiate Negro slavery from the circumstances of imported indentured labour.<sup>91</sup> Ballagh identified two types of servitude. On the one hand he distinguished between voluntary and involuntary servitude: the first applying to servitude entered into by indenture, while the second was the result of a court order, namely the position of a transported English offender.<sup>92</sup> On the other hand, he also distinguished between servitude ‘according to custom’ and servitude ‘by act of assembly’.<sup>93</sup> The point of differentiation here depended upon whether the conditions of the employment were set by the custom of the country or by the local legislature. The difficulty with Ballagh’s analysis of servitude lies in his failure to use his distinctions to any effect. Nowhere does he apply his characterizations to any particular circumstances, which would have demonstrated the practical effect of his analysis. This shortcoming was repeated by another American historian, Richard Morris. Writing in 1946, Morris provided a different analysis of the role of indentured servants, describing them as ‘bonded labor’. By conflating the concept of bondage and that of servitude, Morris thereafter avoided any use of ‘servitude’

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<sup>90</sup> Act 11 of the 11<sup>th</sup> year of the Commonwealth; Hening I, pp. 538-9.

<sup>91</sup> Ballagh, *White Servitude in the Colony of Virginia*, pp. 33-4.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* p. 40. Banishment was widely used as a punishment by colonial courts in colonial America. Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London, 2013). Part 2 is devoted to this subject.

except as a condition of coerced labour imposed as a punishment by a colonial court in the New World.<sup>94</sup> Morris, like Ballagh, also gave no examples of this process being put into practice. This was despite his claim to have reviewed some 20,000 unpublished cases which might have illuminated his analysis.<sup>95</sup> Yet Morris, alone in the literature, understood the dilemma posed by the language of servitude in relation to transported offenders. Where Ballagh had identified ‘involuntary servitude’, but did not describe its incidence in Virginia, Morris recognised that:

Contracts of employment entered into under duress were voided by the court. In point of fact this rule applied strictly to redemptioners and apprentices. It would be unrealistic to consider as voluntary the binding of convicts transported from Britain, persons convicted in the colonies, and delinquent debtors, even though theoretically such persons had voluntarily accepted bound labor in lieu of a more drastic alternative.<sup>96</sup>

Morris’s analysis therefore negates the argument that a transported offender, once in Virginia, was an indentured servant, as such, but he did not draw any conclusions as to the actual position in which a transported offender was placed.

Yet the evolution of a different terminology to describe servants in Virginia extended beyond mere language. During the seventeenth century the colonial legislature and the courts (Ballagh’s servitude by custom or by assembly) attached legal rights and obligations to the relationship of master and servant that differentiated servitude in Virginia from the contemporary law of master and servant in England. Depending upon the author, there are a great number of rights

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<sup>94</sup> Morris, *Government and Labor in Early America*, p. 310. Morris was to classify apprentices as ‘merely a highly specialized and favored form of bound labor’. *Ibid.*

<sup>95</sup> Morris, *Government and Labor in Early America*, p. ix.

<sup>96</sup> Morris, *Government and Labor in Early America*, p. 311.

and obligations or a just a few fundamental underlying principles.<sup>97</sup> Underlying these analyses was the question which remains generally unanswered in the literature: did Virginian common law create a transferable property in the services of the servant? If it did, was this similar to the English common law status of a servant or did a separate ‘law of servants’ evolve in Virginia? And, more directly relevant to this thesis, did Virginia develop a derivative personal law of transported convicts which was subsumed within the meaning of servitude? Morris goes so far as to admit what he describes as a master’s ‘quasi-proprietary interest’ in the services of a servant.<sup>98</sup>

According to Ballagh, servitude had three characteristics differentiating it from the master and servant relationship as it existed in England. The first characteristic was that an indentured servant came to be considered as a chattel, capable of being sold and bought. The second characteristic was an extension of the first; that an indentured servant could be transmitted in a will. The third characteristic involved the ability of the master to punish an errant servant. While the power of punishment was an inherent power of a master in English law, in Virginia this power went further and, over time, came to include the power to extend the term of the servitude if, for example, the servant ran away. In Virginia, as in contemporary England, the nature of servitude was moulded by the decisions of local justices, and by the statutes of the Virginian House of Burgesses. The bench and the Assembly were dominated by representatives of the plantation owners

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<sup>97</sup> Morris, *Government and Labor in Early America*. Morris’s analysis, which examines individual rights and obligations, extends from pp. 390 to 512. Ballagh’s analysis on the other hands is historical and extends from pp. 33-80.

<sup>98</sup> Morris, *Government and Labor in Early America*, p. 401.

and, as in contemporary England, the determinations of the justices and the enactment of the legislature tended to favour the master against the servant.<sup>99</sup>

In this Chapter it has been demonstrated that the English laws of master and servant described by Sir Thomas Smith reflected the evolution of this relationship from medieval to early modern times culminating in the Statute of Artificers of 1562. Essentially, while based on contract and exclusivity at the time of formation, the relationship was influenced by conditions imposed by statute and underpinned by the coercive powers of the justices. The founders of the colony of Virginia carried a semblance of English law with them, but it was quickly modified to recognise the peculiar circumstances of colonial life, especially the debt burdens incurred as part of the cost of travelling to the colony. After 1619, through the House of Burgesses, colonists determined their own laws of master and servant. Adopting both the coercive powers of the state and the early practice of martial law, the English concept of freedom to contract and exclusivity disappeared. Servants arriving in Virginia were subjected to the new status of colonial servitude, whether they held indentures, such as the Logward Indenture of 1628, or held no indentures at all. Colonial servitude embraced proprietorial rights of the masters over the servants unlike anything in contemporary England. Even the etymology evolved. Sir Thomas Smith had defined servitude as the status of an apprentice. In Virginia servitude was extended to all servants whether they had indentures or not. It was into servitude that offenders transported from England were placed.

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<sup>99</sup> Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford, 1987), pp. 147-56.

Having considered the early effects of transporting offenders into Virginia and the emergence in Virginia of a home-grown brand of a law of servants (servitude), Chapter 2 will now look at developments in England that made the transportation of offenders possible.

## Chapter 2: Pre-1717 experiments with transportation

On 8 May 1661 Charles II's first parliament convened at Westminster. Before it was dissolved on 24 January 1679, it had enacted six statutes which authorised the forced expatriation of English subjects.<sup>1</sup> Some, but not all of these enactments, directly addressed the issue of the status of offenders once they were deported from England and sent (in the main) to colonial Virginia. Two of the statutes targeted religious non-conformity. These were 14 Car II c. 1 against Quakers and 16 Car II c. 4 against Conventicles. These statutes extended the forms of punishment first developed against religious non-conformists by the later parliaments of Elizabeth I.<sup>2</sup> One statute targeted Moss Troopers (explained below), while a further two statutes provided an alternative punishment for convicted felons, thus putting the first non-capital felonies on to the statute book.<sup>3</sup> The sixth statute was directed at 'the better Reliefe of the Poore of this Kingdom' and, in part, restated earlier legislation of 1597 which had permitted the 'banishment' (now 'transportation') of dangerous or incorrigible rogues, vagabonds, and sturdy beggars.<sup>4</sup>

However, by the time Charles's parliament convened, the practice of transportation from England was already well established. Two further mechanisms had made this possible: first, the royal prerogative of mercy had been utilised in order to reprieve or respite capital offenders, enabling their subsequent deployment in England's colonial endeavours. Second, the armies of the

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<sup>1</sup> Because of the composition of its members and the duration of their service, Charles II's first parliament has been referred to variously as the 'Cavalier Parliament' and the 'Pensioner Parliament'. In this thesis it is referred to by its less pejorative name—the Long Parliament. The 5<sup>th</sup> session, held in October 1665, sat at Oxford. See EB Fryde et al., *Handbook of British Chronology* (London, 1986), p. 576.

<sup>2</sup> 35 Eliz I c. 1 and 35 Eliz I c. 2, which are briefly considered below.

<sup>3</sup> 22 Car II c. 5 and 22 & 23 Car II c. 7, which are also considered below.

<sup>4</sup> 14 Car II c. 12 which is also considered below.



Commonwealth forces had used transportation as a form of mass punishment against defeated Royalists in England, Scotland, and Ireland.<sup>5</sup> The use of statutory and prerogative powers to authorise transportation gave rise to the two tiered approach to transportation that framed the language of the 1717 statute 4 Geo I c. 11 mentioned in the Introduction to this thesis. This dual enabling mechanism of transportation—the use of judicial sentencing (authorised by statute) and exercise of the prerogative (facilitating the transportation of capital respites)—remained a feature of English, and later, British, transportation until the practice ceased. This chapter examines the development of these two separate mechanisms of transportation in order to understand the context in which the formulation of the concept of property in the service of transported offenders mentioned in 4 Geo I c. 11 was possible. This development is examined through two primary questions: first, why and how did contemporary statutes enable transportation before 1717? Second, how had transportation emerged from the exercise of the prerogative prior to 1717?

Turning to the question; why and how did contemporary statutes enable transportation before 1717?

Between 1592 and 1716 some twelve principal statutes empowered justices in sessions to force the deportation of an English subject from England. These measures, which are summarised in Table 1, targeted four different classifications of offences: religious non-conformity, vagabondage, Moss Troopers, and a small range of felonies within clergy. Generally, though not exhaustively, legislation

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<sup>5</sup> Transportation was also used against Irish Catholics after 1655. While the deportation of the Irish enlarged the background against which transportation from the British Isles was carried out, it is not examined here in any detail.

against religious non-conformity required the offender ‘to abjure the realm’.

Abjuration was voluntary but capital sanctions applied in cases of default.<sup>6</sup>

Legislation targeting vagabonds started off, in 1597, contemplating their ‘banishment beyond the seas’, but by 1662 the language had altered to ‘transportation to one of His Majesty’s Plantations’.<sup>7</sup> Some, but not all, of these statutes addressed the status of an offender once they arrived at their destination.

**Table 1: English statutes prior to 1717 authorising forced deportations**

	Year	Citation	Long Title	Target
1	1592	35 Eliz I c. 1	<i>An Act to Retain the Queen’s Subjects in Obedience</i>	Religious non-conformists
2	1592	35 Eliz I c. 2	<i>Act against Popishe Recusants</i>	Religious non-conformists
3	1597	39 Eliz I c. 4	<i>An Act for punishment of Rogues, Vagabonds, and Sturdy Beggars</i>	Vagabonds
4	1603	1 Jac I c. 7	<i>An Act for the Continuance and Explanation of the Statute made in the thirty-ninth Year of the Reign of the late Queen Elizabeth, intituled, An Act for Punishment of Rogues, Vagabonds and Sturdy Beggars.</i>	Vagabonds
5	1650	Act of 9 August 1650	<i>An Act against several Atheistical, Blasphemous and Execrable Opinions, derogatory to the honor of God, and destructive of humane Society</i>	Religious non-conformists
6	1662	14 Car II c. 1	<i>An Act for preventing the Mischiefs and Dangers that may arise by certain Persons called Quakers refusing to take lawful Oaths</i>	Religious non-conformists
7	1662	14 Car II c. 12	<i>An Act for the better Reliefe of the Poore of this Kingdom</i>	Vagabonds
8	1664	16 Car II c. 4	<i>An Act to prevent and suppress seditious Conventicles</i>	Religious non-conformists
9	1666	18 & 19 Car II c. 3	<i>An Act to continue a former Act for preventing of Theft and Rapine upon the Northern Borders of England</i>	Moss troopers
10	1670	22 Car II c. 5	<i>An Act for taking away the Benefitt of Clergy from such as steale Cloth from the Racke and from such as shall steale or imbezill his Majestys Ammunition and</i>	Specified felonies within clergy

<sup>6</sup> 35 Eliz I c. 1, section II and 35 Eliz I c. 2, section V.

<sup>7</sup> 39 Eliz I c. 4, section IV and 14 Car II c. 12, sections VI and XXIII.

			<i>Stores</i>	
11	1670	22 & 23 Car II c. 7	<i>An Act to prevent the malicious burning of Houses, Stacks of Corne and Hay and killing or maiming of Catle</i>	Specified felonies within clergy
12	1713	13 Anne c. 26	<i>An Act for reducing the Laws relating to Rogues, Vagabonds, Sturdy Beggars and Vagrants, into one Act of Parliament; and for the more effectual punishing such Rogues, Vagabonds, Sturdy Beggars and Vagrants, and sending them whither they ought to be sent</i>	Vagabonds

**Compiled** from Volume 5 of *Statutes of the Realm* and Volume 2 of *Acts and Ordinances of the Interregnum, 1642-1660*. Note: Table 1 omits references to continuation statutes which were used extensively to carry over the operation of a ‘temporary’ or ‘probationary’ statute from one session of a parliament to another.

Space does not permit any detailed analysis of these pre-1717 statutes, but some general conclusions can be drawn from them, which provide context for this thesis. First, there was a general lack of consistency in approach to the use of forced expatriations. Since there was no general consistency in drafting contemporary legislation, this was not surprising. For example, the Long Parliament added four items of relevant legislation to the statute book within five years but utilised different approaches on each occasion.<sup>8</sup> Second, legislation addressing vagabonds from Tudor times had been directed at returning offenders to the workforce. This reflected the concerns as to idleness mentioned by Sir Thomas Smith in *De Republica Anglorum* and was summed up in the Tudor formula ‘there to put him or her selfe to labour as a true subiect ought to doe’.<sup>9</sup> Under Henry VIII, legislation against vagabonds became increasingly punitive,

<sup>8</sup> 14 Car II c. 1 provided simply that Quakers, for a third offence, would be required ‘to abjure the Realms or otherwise it shall and may be lawfull to and for His Majestie [etc] to give order and cause him or them to be transported in any Ship ... to any of His Majesties Plantations beyond the Seas.’ (Section I). 14 Car II c. 12 (Section VI) spelled out for the first time the real nature of transportation in that an idle or disorderly vagabond could be ‘transported to the English Plantations ... there to be disposed in the usual way of Servants for a terme not exceeding seaven years.’. 16 Car II c. 4 addressed process while 18 & 19 Car II c. 3 reverted to an even more pared down version of the first 1662 legislation.

<sup>9</sup> Section III of 39 Eliz I c. 4.

particularly with respect to the use of corporal punishment as a deterrent in addition to sending the offender home to work.

In 1547, the first parliament of Edward VI passed the statute *An Acte for the Punishment of Vagabondes and for the Relief of the poore and impotent Parsons* (sic). This was the statute 1 Edw VI c. 3, sometimes referred to as the ‘slave legislation’.<sup>10</sup> The statute stepped away from the Henrician legislative trend of returning vagabonds to the workforce by authorising masters to apprehend recalcitrant servants who were to be brought before the justices, branded, and adjudged to be slaves for two years.<sup>11</sup> Offenders who ran away from these arrangements were to be enslaved for life. Section IV of the statute defined the nature of a master’s rights in respect of the slave, which also extended to apprentices. These included (stated in modern English) the right to let, to further sell, bequeath or give, the services and labour of the slave or servant so adjudged; that is, these provisions extended only to slaves and apprentices, but not to ordinary servants. Importantly, the statute characterised the rights of the master as being ‘after suche like sorte and manner as he maye doo of any other his movable coods or Catells’, which rights were transmitted to an assignee. HB Simpson, writing in 1899, cited these provisions as being the origins of property in the service of the offender.<sup>12</sup> Section VI of the statute addressed the circumstances where the masters of a vagabond could not be identified. In these circumstances, the justices could order the offender into slavery for the benefit of the city,

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<sup>10</sup> The best analysis of the legislation and its origins is contained in C.S.L. Davies, "Slavery and Protector Somerset: The Vagrancy Act of 1547," *The Economic History Review*, 19 (1966), pp. 533-49.

<sup>11</sup> See 1 Edw VI c. 3, Section I

<sup>12</sup> HB Simpson, "Penal Servitude: Its Past and Its Future", *Law Quarterly Review*, 15 (1899), pp. 33-50, at p. 37. Simpson incorrectly cites Section 8 as being the authorising provision.

borough, or town, to be put to work on roads or other public works. Vagabonds born outside England ('the Realm') were to be sent to the nearest seaport to be conveyed home.<sup>13</sup> Simpson curiously saw this measure as anticipating the assignment of convicts 200 years later.<sup>14</sup> Simpson's arguments, while interesting, are not compelling. The legislation was repealed in 1549.<sup>15</sup> An alternative basis of understanding property in the service of the offender is offered in Chapter 4.

The legislation of 1597 (39 Eliz I c. 4) permitted the justices, at their discretion, to set apart those vagabonds who were categorised as being either 'dangerous or incorrigible' for additional punishment. This could involve 'banishment beyond the seas' or service in the galleys; but banishment was contingent upon the Privy Council first designating places as being suitable destinations. While galley service in 1597 might have been feasible, there is little evidence of its use.<sup>16</sup>

Banishment, on the other hand, does not appear to have been practicable. Not until September 1603, however, did the Privy Council under James I designate places to which offenders might be sent.<sup>17</sup> Additionally, between 1597 and 1607, as discussed in Chapter 1, England had no overseas territories which might have been utilised.<sup>18</sup>

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<sup>13</sup> Section 8.

<sup>14</sup> Simpson, "Penal Servitude: Its Past and Its Future", p. 37.

<sup>15</sup> 3 & 4 Edw.VI, c.16.

<sup>16</sup> Naval authorities also saw the use of slaves or people under punishment in the galleys as detrimental to discipline. Simpson, "Penal Servitude: Its Past and Its Future", p. 38.

<sup>17</sup> *A Proclamation for the due and speedy execution of the Statute against Rogues, Vagabonds, Idle, and dissolute persons*. James F Larkin and Paul L Hughes, *Stuart Royal Proclamations*, volume 1, *Royal Proclamations of King James I 1603-1625* (Oxford, 1973), p. 51.

<sup>18</sup> There is no evidence of vagabonds being transported to Ireland. Paul Slack's work suggests that Irish vagabonds found in England were returned to Ireland. But he does not suggest that English vagabonds were sent to Ireland. See Paul A. Slack, "Vagrants and Vagrancy in England, 1598-1664," *The Economic History Review*, 27 (1974), p. 372.

Evidence of the initial use of the banishment powers from 39 Eliz I c. 4 is hard to find. The recital to the 1603 statute 1 Jac I c. 7 stated that offenders deported from England were returning home contrary to the provisions of the legislation, but the authorities were unable to identify them.<sup>19</sup> This suggests some banishment pursuant to the 1597 legislation and the 1603 proclamation had already occurred. The remedy invoked in the statute was to revive the branding of first offenders so as to permit easier detection. From the available assize records, only one case from 1606 is noted.<sup>20</sup> Nevertheless, banishment does not appear to have been utilised until 1614 in the circumstances noted below.

A third conclusion to be drawn from the legislation listed in Table 1 is the evolving nature of the status of a transported offender. Offenders deported as religious non-conformists from the 1592 and the 1650 legislation were simply to leave England, presumably at their own expense. As Craies pointed out, abjuration left the choice of destination to the offender.<sup>21</sup> But it also left open the issue of subsequent status. A Conventicle or Popish Recusant was at liberty to take up employment, or not, as he or she chose, most probably with religious affiliates in Europe. The situation with transported vagabonds was different. Tudor legislation against vagabonds had been aimed at returning the offender to the workforce. It followed, though was not stated explicitly at the time, that banishment was intended as a precursor to the utilisation of the offenders' labour.

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<sup>19</sup> 1 Jac I c. 3, section III.

<sup>20</sup> J.S. Cockburn, ed., *Calendar of Assize Records: Kent Indictments: James I* (London: 1980), p. 27. Ref. 159 states: 'Jey, Richard and Shepton, John, Labourers of Orpington, indicted for trespass. On 20 February 1606 they entered the close of Christopher Hampden, esq., at Orpington and trampled grass there. Confessed: transported.' Trespass was a civil wrong, not a crime. One interpretation is that the justices had seen the defendants on earlier occasions and had deemed them to be incorrigible. This would anticipate the use of this power in 1614 mentioned below.

<sup>21</sup> WF Craies, "The Compulsion of Subjects to Leave the Realm", *Law Quarterly Review*, 6 (1890), pp. 388-410, at pp. 393-4.

It is no surprise, therefore, that when evidence of actual banishments were ordered by the justices in 1614, there was an immediate proximal relationship between merchants with access to shipping and the deployment of the banished offenders in the service of the merchants or their connections. The role of the Virginia Company of London was considered in Chapter 1. The role of the East India Company is considered below.

The status of transported vagabonds started to be defined by the Long Parliament and for good reason. By the time the parliament convened, there was an assumption underlying all of the subsequent deportation legislation that offenders would be sent to one of the American colonies, usually Virginia. It also reflected some forty years of prior experience with the practice of transportation from England to Virginia. It followed that when the legislation addressed the status of offenders sent to America, it was assumed, sometimes explicitly, that the offenders would be engaged in the colonies as servants. The legislative position evolved quickly during May 1662. The measures against Quakers in 1662 (14 Car II c. 1) simply required their transportation ‘to one of His Majesty’s Plantations beyond the Seas.’ No term was set for the period of transportation.<sup>22</sup> Two weeks later the parliament went further with respect to the transportation of vagabonds.<sup>23</sup> This legislation, 14 Car II c. 12, essentially a confused restatement of aspects of the 1597 legislation 39 Eliz I c.4, addressed the issue of the transportation of vagabonds twice; once with respect to offenders from London and later with respect to offenders from all over England. Reflecting the London-centric concerns of the parliamentary committee considering the legislation, the London

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<sup>22</sup> Royal assent 2 May 1662. *Journal of the House of Lords* (hereinafter JHL), Volume 11, p. 443.

<sup>23</sup> Royal assent 19 May 1662. *JHL*, Volume 11, p. 471.

conditions were limited in their operation and required the involvement of the Privy Council. Here the legislation specified that an offender could be transported ‘to any of the English Plantations beyond the Seas, there to be disposed in the usual way of Servants, for a Term not exceeding seven Years.’ This was the first clear statement of the intention of transportation by an English parliament both with respect to status and to the term of years for which the punishment of transportation was to operate. The significant point about the wording of Section VI of 14 Car II c. 12 was that, while the language of legislation from 1597 was being restated (and brought up to date), the circumstances of transportation were very different. The statute 14 Car II c. 12, therefore, was not breaking new ground; rather it was reflecting what had already come into being in the intervening years. The second mention of transportation, at the end of the statute, simply restated the essence of 39 Eliz I c. 4, but was open ended and specified no term of years.<sup>24</sup> The existence, then, of parallel provisions in the same statute but with somewhat different consequences failed, definitively, to describe the nature of the punishment of transportation.

A fourth conclusion to be drawn from the legislation listed in Table 1 involved the emerging role of the shipping contractor in the processes of transporting offenders to America. The 1597 statute 39 Eliz I c. 4 had required that the cost burden associated both with banishment and galley service be borne by the justices from municipal funds. An example of the deterrent effect of this requirement can be seen in 1602 when the government of Elizabeth I was seeking to recruit offenders

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<sup>24</sup> 14 Car II c. 12, Section XXIII.



into galley service.<sup>25</sup> The subsequent engagement of merchants in the processes of deportation had the effect of side-stepping the issue of costs.

In 1664, in an exercise of punitive cost shifting, the Long Parliament moved the cost burden associated with forced expatriation from the municipality to the offender—in this instance people deported as Conventicles under the statute 16 Car II c. 4. The provision was addressed only against those Conventicles unable to pay a fine in England of £100. Previously silent on the mechanics of transportation, the statute first shifted the cost liability to the offender, authorising the sequestration of the real and personal estate of the offender so as to meet the costs incurred.<sup>26</sup> It then authorised the sheriff to contract with ‘any Master of a Ship merchant or other person for the transportation of such Offender at the best rate he can.’ Anticipating by some fifty-three years, the working of 4 Geo I c. 4 in 1717, the statute provided (emphasis added);

and that in every such case it shall and may be lawful for such person so contracting with any Sheriffe for transporting an Offender as aforesaid to detain and employ every such Offender so by them transported as a Labourer to them or their Assigns for the space of Five years to all intents and purposes *as if* he or she were bound by Indentures to such person for that purpose;<sup>27</sup>

This form of punishment was not repeated in later transportation legislation. As discussed in Chapter 1, indentures, whether real or constructive, were to define the status of servants and convicts in servitude in colonial America.

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<sup>25</sup> For a discussion on problems faced by two assize judges in finding supporters to pay the £3 needed to support felons reprieved for galley service see ‘Cecil Papers: July 1602, 21-25’, in *Calendar of the Cecil Papers in Hatfield House*, Volume 12, 1602-1603, ed. R A Roberts (London, 1910), pp. 239-252 <http://www.british-history.ac.uk/cal-cecil-papers/vol12/pp239-252> [accessed 19 January 2015].

<sup>26</sup> 16 Car II c. 4, section III.

<sup>27</sup> 16 Car II c. 4, section IV.

A fifth conclusion to be drawn from the legislation listed in Table 1 touched on the use of transportation for specific offences which fell within benefit of clergy, the aim being to decrease its availability. The first of these measures, in 1666, was invoked as a discretionary punishment against convicted Moss Troopers. Moss Troopers were border raiders convicted in the counties of Northumberland and Cumberland.<sup>28</sup> Benefit of clergy was removed for ‘notorious Thieves and Spoile takers’ convicted of theft. The trial court was empowered ‘to transport or cause to be transported the said Offenders and every of them into any of His Majestyes Dominions in America there to remaine and not to returne.’<sup>29</sup> No mechanism for the implementation of this punishment was prescribed. In 1670, two similar reductions were made in the availability of benefit of clergy in 22 Car II c. 5 and 22 & 23 Car II c. 7. The significance of the developments in these two statutes, despite their narrow scope, was the extension of statutory transportation to crimes within non-clergyable felony. Legislation prior to 1666 and 1670 never classified the offenders as felons. Vagabonds and religious non-conformists may have committed offences against English law, but they were, at best, only misdemeanants. Felony only attached to transported vagabonds and religious non-conformists if they returned to England without the consent of the crown.<sup>30</sup> In effect, the statutes of 1666 and 1670 introduced the possibility of non-capital felony. However, because of the discretionary element of the punishment and the necessity of the convicted offender having to request (that is bargain) for

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<sup>28</sup> Banditry alone the English/Scottish border had posed difficulties prior to the administration of James VI. In 1605 the Scottish Privy Council had expelled the Graham clan first to the Netherlands and then to Ireland. The Protectorate had enacted laws in 1657 (the Act of 26 June 1657) and its terms were restated in 1662 in 14 Car II c. 22. That statute was due to expire at the end of five years.

<sup>29</sup> 18 & 19 Car II c. III, section II.

<sup>30</sup> M Hale, *Pleas of the Crown: Or a Methodical Summary of the Principal Matters Relating to That Subject* (London, 1715), p. 124.

transportation instead of capital punishment, the significance of these three statutes has generally gone unremarked. The use of non-capital felony was to have wide application after 1717.

One final observation needs to be made with respect to the pre-1717 statutes mentioned in Table 1. This relates to the unusual nature of some of the provisions of the 1713 statute, 13 Anne c. 26. In what was an otherwise unremarkable consolidating and continuation statute, concerned with the management of costs and the efficiency of the various court officials involved in the movement of vagabonds from places of trial to their place of origin, the statute included some measures which attempted to control the status and circumstances of offenders about to undergo transportation as incorrigible vagabonds. Though well intentioned, the provisions were probably unenforceable. An offender could not be transported until the intended ‘Master or Mistress’ provided security to the court (in England) in the amount of £40. This was to ensure that the offender was supplied with ‘Necessaries fitting and convenient’ and at the end of the seven year term to be ‘absolutely discharged and set at Liberty and in the mean Time not sold or disposed of to any Alien or aliens whatsoever’.<sup>31</sup> No similar provision addressing the welfare of a transported offender was contemplated again until 1784 during the short operational term of the statute 24 Geo III c. 12, which is considered in Chapter 4. Nevertheless, the statute 13 Anne c. 26 confirms that the terms of transportation for vagabonds, and probably for most other offences as well, had settled at seven years. The statutory term set in Virginia in 1705 for servants arriving without indentures was five years, assuming they were adults.

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<sup>31</sup> 13 Anne c. 26, Section XX.

Turning now to consideration of the question; how had transportation emerged from the exercise of the royal prerogative prior to 1717?

The royal prerogative of pardon provided the second device by which transportation came into the criminal justice system. Stanley Grupp pointed out in 1963 that because of its close association with the executive arm of government (the crown), pardons have always been invested with a certain degree of flexibility which makes it difficult to give a clear cut definition of what amounts to a pardon. On the one hand a pardon could be viewed as an act of grace remitting the guilt of an offender. On the other hand, a pardon could just refer to an act of clemency.<sup>32</sup> The complexity of the resulting arrangements was demonstrated by Kesselring.<sup>33</sup>

Since Anglo-Saxon times English kings had been invested with the personal power to pardon a subject. This could occur before or after the conviction of an offender, could be absolute or conditional, and could be granted either before or after the expiration of any punishment imposed.<sup>34</sup> Henry VIII claimed that the power of pardon 'was fundamental to his authority'.<sup>35</sup> A prime example of the use of the prerogative power of pardon was the deployment of condemned felons in public or private enterprises. The possibility of offenders being sent beyond the seas to labour in the service of England had been under consideration since the 1580s. In about 1580 an anonymous proposal was put to the Privy Council for

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<sup>32</sup> Stanley Grupp, "Some Historical Aspects of the Pardon in England," *The American Journal of Legal History*, 7 (1963), pp. 51-62

<sup>33</sup> KJ Kesselring, *Mercy and Authority in the Tudor State*, ed. Anthony Fletcher, John Guy, and John Morrell, *Cambridge Studies in Early Modern British History* (Cambridge, 2003), pp. 79-83.

<sup>34</sup> Grupp, "Some Historical Aspects of the Pardon in England", p. 51-2.

<sup>35</sup> Cynthia Herrup, "Punishing Pardon: Some Thoughts on the Origins of Penal Transportation." S Devereaux and P Griffiths ed. *Penal Practice and Culture, 1500-1900, Punishing the English* (Basingstoke, 2004), p. 125. The statute 27 Hen VIII c. 25 legislated that the Crown had had the 'whole and sole power' to 'pardon or remit any treasons, murders, manslaughterers, or any felonies whatsoever'.

England to occupy and fortify the Straits of Magellan to limit Spanish hegemony in the Pacific while the waters were to be patrolled by ‘Clerke the pyrott vppon promise of pardon.’ The fortifications were to be manned by ‘condemned englishemen and women in which there may be found hope of amendment’.<sup>36</sup> This project did not proceed. Nor did the suggestion of Secretary of State Sir Thomas Smith to utilise the labour of vagabonds in Ireland in the 1580s.<sup>37</sup> In 1584 Richard Hakluyt suggested the utilisation of vagabonds in possible English colonies yet to be established in North America.<sup>38</sup> These ideas conflated two general themes, the first arguing that the English society would be improved if the dregs of that society were removed from it. James I was to indicate his support for the idea in 1619 by encouraging the banishment to Virginia of ‘lewd and idle persons’.<sup>39</sup> The second argument was based on the idea that crime arose from overpopulation. The remedy for this malady to contemporary theorists, therefore, was to relieve the population of excess growth by establishing colonies.<sup>40</sup> It was left to Francis Bacon to criticise these ideas by querying whether new societies

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<sup>36</sup> The text of the original proposal is set out in RH Tawney and Eileen Powers, eds., *Tudor Economic Documents*, volume III (London: 1924), pp. 224-32, at pp. 227, 228. See also Howard Mumford Jones, "Origins of the Colonial Idea in England," *Proceedings of the American Philosophical Society*, 84 (1942), and Robert Lemon, ed., *Calendar of State Papers, Domestic Series, of the Reign of Elizabeth, 1581-1590* (London: 1865), p. 640. The *Calendar* does not mention that action was taken but records the presentation of the proposal. The American historian Edmund Morgan suggests that the author of the proposal was Richard Hakluyt snr. See Morgan, *American Slavery American Freedom*, p. 17.

<sup>37</sup> Sir Thomas Smith, *De Republica Anglorum. A Discourse on the Commonwealth of England*. Leonard Alston, ed., (Cambridge, 1906), p. 46.

<sup>38</sup> Richard Hakluyt, Discourses on Western Planting, 1584 quoted in *The Writings and Correspondence of the Two Richard Hakluyts*, ed. E. G. R. Taylor (London, 1935), Vol 2: pp. 234.

<sup>39</sup> Alexander Brown, *The First Republic in America* (Boston, 1898). At pp. 248-9 Brown quotes comments made by James I while at Newcastle on a progress to Scotland in May 1617 suggesting that ‘malefactors’ be sent to Virginia, and not to return.

<sup>40</sup> Klaus E Knorr, *British Colonial Theories 1570-1850* (Toronto, 1944; reprint, 1963), p.49. Jordan and Walsh attribute the 1615 ‘settlement’ at Saldanha Bay as an effort by Sir Thomas Smythe to implement such a colony: D Jordan and M Walsh, *White Cargo: The Forgotten History of Britain's White Slaves in America* (New York, 2008), p. 66. See below for an alternative view.

should be founded from the dregs of the old.<sup>41</sup> In 1586 the idea of sending condemned felons to the galleys was considered.<sup>42</sup> Interestingly, this process was initiated through a commission, a procedure that was reused in 1602 and 1614 as examined below.

In 1577 Martin Frobisher, on his second voyage to find a north-west passage to the Pacific, intended taking condemned men along with the expedition. Ten condemned men were to be made available to him; six were to be left at Friezland, 'to learn the state of the country'.<sup>43</sup> However, on the day before he sailed from Harwich on 31 May 1577, Frobisher 'dismissed' the men and left them in England.<sup>44</sup> At the end of the fifteenth century, the Portuguese had pioneered a similar system, utilising condemned men as part of their exploration activities. Vasco da Gama departed Portugal on his second voyage to India in 1497 with ten condemned men with authority to set them onshore to 'observe the Countrey and people'.<sup>45</sup> On 10 January 1497 da Gama put two of these men ashore at Saldanha Bay (modern Table Bay, South Africa) to make contact with the Hottentot natives.<sup>46</sup> Two further condemned men were left at St. Raphael on the African coast.<sup>47</sup> When his expedition reached Calicut, da Gama sent two condemned men

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<sup>41</sup> Francis Bacon, 'Of Plantations', in *Essays of Counsels Civil and Moral*; James Spedding, Robert Ellis, and Douglas Heath, eds. *The Works of Francis Bacon, Volume XII* (Boston, 1900), pp. 194-8, at p. 195.

<sup>42</sup> Kesselring, *Mercy and Authority in the Tudor State*, p. 85.

<sup>43</sup> W Noel Sainsbury, ed., *Calendar of State Papers, Colonial Series, East Indies, China and Japan 1513-1616* (London: 1862), pp. 20-22. And Kesselring, *Mercy and Authority in the Tudor State*, p. 84.

<sup>44</sup> Richard Collinson, ed., *The Three Voyages of Martin Frobisher, in Search of a Passage to Cathay and India by the North-West, A.D. 1576-8, Reprinted from the First Edition of Hakluyt's Voyages, Etc.* (London, 1857), p. 122.

<sup>45</sup> Samuel Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes Contayning a History of the World in Sea Voyages and Lande Travells by Englishmen and Others*, volume 2, (Glasgow, 1905), p. 67.

<sup>46</sup> Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes*, volume 2, pp. 66-67.

<sup>47</sup> Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes*, volume 2, p. 67.

to make initial contact with the resident authorities.<sup>48</sup> Nothing in the records suggest that these condemned men were being utilised other than for constructive purposes, information gathering, and reconnoitre, although it is clear that their particular circumstances rendered them more likely to be at risk of attack or injury.

The kingdom of Denmark had utilised the practice of abandoning men on uninhabited shores as a form of capital punishment. In 1605 the Englishman, John Hall, accompanied a Danish voyage of discovery to Greenland. Two ‘malefactors’ were abandoned on the Greenland coast with some necessities and food.<sup>49</sup> More contemporary was the circumstance utilised by Sir Thomas Gates in Virginia when faced with a mutiny from settlers travelling from Bermuda to Virginia in 1609. As well as ordering that some mutineers be hanged, Gates ordered two condemned mutineers to be put ashore on an uninhabited island, meaning to let them perish or survive as circumstances warranted.<sup>50</sup> The intention here clearly was that the abandoned men should be left to perish.

Ideas regarding the utilisation of condemned felons, as opposed to vagabonds, were revived in proposals regarding the settlement of the Virginia Colony and in the interests of the East India Company. The Lieutenant-Governor Sir Thomas Dale in Virginia in 1611 and Thomas Aldworth of the East India Company in Surat in 1614 both advocated the utilisation of large numbers of condemned

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<sup>48</sup> Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes*, p. 69

<sup>49</sup> Samuel Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes*, Volume 14 (Glasgow, 1905), p. 335.

<sup>50</sup> Samuel Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes Contayning a History of the World in Sea Voyages and Lande Travells by Englishmen and Others*, volume 19, (Glasgow, 1905), pp. 29-30.

felons to support their respective interests.<sup>51</sup> There is no record of a response to either proposal, but it would seem reasonable to conclude that both proposals were seen as impracticable in their implementation probably because of the large numbers of condemned felons involved.<sup>52</sup> Dale proposed sending 2,000 condemned men to Virginia, while Aldworth proposed an annual despatch of some 'one hundred men' per year.<sup>53</sup> These numbers seemed impracticable, but, as is demonstrated below, there was some preparedness in 1614 to manipulate the criminal justice system to achieve somewhat similar objectives.

While the power of pardon was reserved to the crown, the deportation of condemned felons was pervaded by a lack of precision about the meaning of the terminology used by both court and government officials suggesting measures short of a pardon. In 1610 the English government had prepared written instructions to be used in Virginia. Contemplating that the colony would be locally administered by a President and Council, the instructions addressed the exercise of a criminal jurisdiction. The President and Council, by majority decision, were authorised 'to give judgment of death upon every such offender, without the benefit of clergy, except only in cases of manslaughter'. But the instructions went on (emphasis added):

and noe person soe adjudged, attainted, or condemned shall be *reprieved* from the execution of the said judgment, without the consent of the said president and council or the most part of them by whom such judgment shall be given: and that noe person shal receive any *pardon*, or be absolutely discharged of any of the said offences, for which he shall be

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<sup>51</sup>Dale's suggestion was contained at the end of his letter to Lord Salisbury on 17 August 1611. The full text of the letter is contained in Alexander Brown, *The Genesis of the United States*, vol. 1 (Boston, 1891), pp. 501-8. Aldworth's letter, dated 25 January 1612, is contained in William Foster, *The Voyage of Thomas Best to the East Indies 1612-1614* (New Delhi, 1995), pp. 251-2.

<sup>52</sup> These problems were to underpin the transportation of Jacobite rebels in 1716 and the presence of military guards with the First Fleet travelling to New South Wales.

<sup>53</sup> Brown, *The Genesis of the United States*, pp. 505-6. Foster, *The Voyage of Thomas Best to the East Indies 1612-1614*, pp. 251-2.



condemned to death as aforesaid, but by pardon of us, our heirs and successors, under our great seale of England.<sup>54</sup>

It is clear from the manner in which the authority was proposed to be delegated that the power of pardon was to be reserved exclusively to the Crown. The authority that was delegated to the Virginian administration was only the power to reprieve, suggesting that ‘reprieve’ had a lesser meaning and status than ‘pardon’. Governor Phillip was to face comparable restrictions on his capacity to issue pardons in New South Wales in 1788. This raises the question, what was the status of condemned felons in receipt of pardons or lesser forms of sentence suspension once they left England? For example, what precisely was intended by courts when offenders were, for example, ‘respited for the Indies’? It will become clear that some such orders did not appear to be executed as such, but can only have been regarded as executory provisions, requiring some other process to be undertaken in order for the respite to be implemented fully, if, indeed, that was the intention.<sup>55</sup>

The use of the reprieve requires further consideration since it was the device that connected the use of the prerogative with the earliest forms of forced expatriation of English subjects from England. Reflecting Grubb’s remarks as to the flexibility surrounding the use of the prerogative, the reprieve (in the 1614 cases considered below usually referred to as ‘a respite’) was essentially a judicial device rather

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<sup>54</sup> The text of the instructions is set out in Brown, *The Genesis of the United States*, Volume 1, p. 69

<sup>55</sup> English court records are only available from 1613 onwards and these have been limited to London and Middlesex. However, some comfort can be taken from the fact that other researchers, notably the English genealogist Peter Wilson Coldham, have undertaken far more exhaustive research into all contemporaneous court records to identify transportation orders to America and do not increase the number of cases beyond those utilised below to support the following arguments. It should be noted that some of the conclusions reached here differ from those of Coldham.

than a sentence handed down by a court. During the seventeenth century ‘respite’ was used with different intentions. It could be deployed by trial judges to suspend the trial process to permit further inquiry.<sup>56</sup> On the other hand, it could be used to arrest judgement where, for example, a convicted felon intended to plead clergy. If judgement had already been given, the sentence could also be ‘respited’ to enable the condemned felon to appeal to the Crown for clemency. Contemporary seventeenth century writers such as Sir Edward Coke and Sir Matthew Hale placed great weight on the associations between the crown, justice, and the use of the royal prerogative of pardon, but at no time do they mention the reprieve or respite by the king as part of the process of granting a pardon.<sup>57</sup>

Apart from the commission of 1586 mentioned above, there are two principal examples of the prerogative being utilised to make felons under sentence of death available for state or private use through the process of reprieve. These are two commissions issued by the Crown to committees of the Privy Council to reprieve condemned felons for specified purposes; one in 1602 and the other in 1614. The 1602 commission only covered the use of condemned felons in the galleys and was not, strictly speaking, concerned with the forced deportation of those reprieved. By a commission dated 14 June 1602, Elizabeth I authorised her Privy Council (or a committee of its members) to ‘repyve and staye from Execution

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<sup>56</sup> See Sessions, 1614:16 and 17 July, *County of Middlesex. Calendar to the sessions records: new series*, volume 2: 1614-15 (1936), pp. 1-34.

<sup>57</sup> Sir Edward Coke, *The Third Part of the Institutes of the Laws of England : Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London, 1680), and Hale, *Pleas of the Crown: Or a Methodical Summary of the Principal Matters Relating to That Subject*. Blackstone, writing some 130 years after these events, was quite precise about the use of the reprieve which he sees solely as a judicial, as opposed to royal prerogative, power utilised within judicial proceedings to prevent injustice by a too rapid implementation of capital punishment, See William Blackstone, *Commentaries on the Laws of England* (London, 1765), Volume 4, p. 387. Sir William Holdsworth’s extensive *A History of English Law* in published in fourteen volumes between [ ] and [ ] makes no mention of the use of respites or reprieves during the process of criminal trials.

suche and so many Persons attainted and convicted of and for anye Robbery or Felonye ... being of strong and able Bodyes to serve in Gallies'.<sup>58</sup> Mary Gretton described this commission as being the 'fountain-head' of the later transportation regime.<sup>59</sup> Gretton's rationale was based on the fact that the 1597 legislation (39 Eliz I c. 4) permitted both banishment and galley service. Since the latter, by definition, contemplated the offender's labour then the labour of the former must have been intended. A more straightforward explanation, which Gretton seemed to overlook, was that the intention of the entire Tudor regime against vagabonds was to return them home to work. Banishment and galley service therefore both implicitly involved the labour of the offender. In any event, as later correspondence to the Privy Council made clear, even the commission of 1602 proved unsuccessful in raising men for galley service. An element of the reprieve process required the justices, in applying the reprieve, to raise £3 from the friends of the offender to meet the cost of maintaining the galley. In default, the expense was to be borne from municipal funds. This met with as much success as requiring municipal funds to meet the cost of banishment.<sup>60</sup> For the purpose of this thesis, however, the real significance of the 1602 commission lay in the fact that it was utilised extensively as a precedent for the next commission utilising the reprieve, that of 1614.

On 21 January 1614, James I issued a commission to a committee of his Privy Council to reprieve condemned felons for specified purposes. The importance of

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<sup>58</sup> The text of the Commission is set out in Mary Sturge Gretton, *Oxfordshire Justices of the Peace in the Seventeenth Century* (Oxford, 1934), p. xci.

<sup>59</sup> Gretton, *Oxfordshire Justices of the Peace in the Seventeenth Century*, p. xci.

<sup>60</sup> See the reports to the Council by justices Sir Peter Warburton and Sir Christopher Yelverton of 24 July 1602 pointing out that of eleven men reprieved for galley service, only the friends of two men were willing or able to raise the necessary moneys. RA Roberts, ed., *Calendar of the Cecil Papers at Hatfield House, Volume 12, 1602-1603*, (London: 1910), July 1602, 21-25, pp. 239-252.

this commission lies in the abundance of evidence available from the courts in London during 1614, from the creation of the commission itself, from the direct result of the exercise by the Privy Council committee in the Open Warrant of 1614 drawn two days later, on 23 January 1614, and, finally, from the records of the East India Company which provide, in some detail, the subsequent deployment of the individuals mentioned in the Open warrant. These events are considered here in some detail because of their direct relevance to this thesis; they demonstrate the first detailed application of the prerogative and they describe the subsequent status of persons affected. This consideration starts with an examination of the records of the Middlesex sessions during 1614.<sup>61</sup> It is useful to note that the word ‘transportation’ itself was not used here; instead orders were recorded using the formulas, ‘respited for the Indies’ or ‘respited for the Bermudas’.

During 1614 there were seven instances of the use of the respite mentioned in the Middlesex Sessions records in the circumstances of felony convictions and the punishment of vagabonds. Each of these resulted in transportation orders being handed down to thirteen different men and women. It is also useful to note that the information recorded in the Sessions records does not necessarily mean that the named individuals actually went to the East or West Indies. It will be demonstrated that some respite orders resulted in the offender being sent to (modern) South Africa and the East Indies. The circumstances of and the citations for each of the 1614 cases are set out in detail in Appendix 4. These are summarised in Table 2. (The names in italics will reappear in Table 3)

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<sup>61</sup> *County of Middlesex. Calendar of the sessions records: new series*, volume 1: 1612-14 (1935).

**Table 2: Offenders 'respited' during 1614**

	<b>Offender: Trial date</b>	<b>Finding</b>	<b>Punishment</b>	<b>Probable Characterisation</b>
1	Helen Nutter 17 May 1614	not guilty of theft	'Respited for the Indies'	incorrigible vagabond
2	Henry Bourne 20 June 1614	guilty of sheep stealing	denied benefit of clergy; to be hanged but 'Respited for the Bermudas'	felon
3	<i>William Clarke</i> 20 June 1614	guilty of sheep stealing along with Henry Bourne	denied benefit of clergy; to be hanged but 'Respited for the Bermudas'	felon
4	Barnaby Littgold 20 June 1614	crime imprecisely defined	to be sent to the Bermudas	incorrigible vagabond
5	Joan Sanson 14 July 1614	not guilty of theft	to be sent to the Bermudas	incorrigible vagabond
6	Richard Storie 27 July 1614	guilty of horse stealing	to be hanged but 'Respited for the Bermudas'	felon
7	George Shorte 3 September 1614	guilty of housebreaking and stealing	to be hanged but 'Respited to prison for the Indies'	felon
8	Robert Dennys 7 October 1614	guilty of unspecified felony	to be hanged but Respited for the Indies	felon
9	<i>Thomas Peirse</i> 7 October 1614	guilty of felony	to be hanged but Respited for the Indies	felon
10	Elizabeth Jones 7 October 1614	default of sureties	respited for the Indies	incorrigible vagabond
11	<i>John Duffeild</i> 7 October 1614	offence unclear	respited to be sent to Bermuda	felon
12	<i>John Crosse</i> 7 October 1614	guilty of (highway) robbery	to be hanged but respited to be sent to Bermuda	felon
13	<i>Augustine Callys</i> 7 October 1614	guilty of burglary	to be hanged but respited to be sent to Bermuda	felon

**Source:** Compiled from the *County of Middlesex. Calendar of the sessions records: new series*, volume 1: 1612-14 (1935).

Some conclusions can be drawn from these 1614 London cases: first, the justices seem to have been ordering transportation for repeat offenders. This is evidenced by orders against people who have been before the courts on successive occasions

and have been acquitted by the jury on the first occasion but were convicted on the second (or subsequent) appearance.<sup>62</sup> Second, there were instances where the offender was acquitted of felony but ordered to transportation anyway. These cases invite consideration of the offender being punished as an incorrigible vagabond. The third group, particularly those remitted for banishment as part of the gaol delivery on 7 October 1614, suggests that a process of individual selection of offenders was being utilised because of some physical characteristic or unrecorded capabilities of the defendants.

A further issue emerges, although the evidence is entirely circumstantial. Transportation, or banishment, of vagabonds was authorised by the 1597 statute 39 Eliz I c. 4. Once the processes to enable the banishment to occur, that is, arrangements were in place for the offender actually to be shipped to the destination, no further legal processes seem to have been required for the banishment to be put into effect. The transportation of felons was treated differently and required the completion of further formal processes. The cases of Helen Nutter, Barnaby Littgold, Joan Sansom, and Elizabeth Jones (Offenders 1, 4, 5, and 10 listed in Table 2), most probably incorrigible vagabonds, might be explained in this way. In these cases the orders of ‘respite’ meant simply that they were to be detained until sent to Bermuda. Some support for this argument, albeit from a period some twelve months prior, comes from the correspondence of the Spanish ambassador to the court of James I, Don Diego Sarmiento de Acuña. On 17 March 1613 Sarmiento reported on affairs in Bermuda as follows:

The people that were there last year were one hundred persons men and women. There will probably leave here three hundred persons, two hundred and fifty men, and a few women,

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<sup>62</sup> See, for example, the circumstances of Barnaby Littgold, in Appendix 4.

most of them lost people, or put in gaol as vagabonds, and thus they send them out to help in Bermuda.<sup>63</sup>

Entirely absent from the 1614 Sessions records was any mention of the means by which the offenders were to reach the Indies (East or West) or Bermuda. There are no records of warrants from the justices instructing a law officer, perhaps the sheriff, to arrange for the removal of the offenders from gaol to a ship and put the offender into the custody or under the control of any identifiable person. It is reasonable in the circumstances to conclude that the justices were aware of some one or more entrepreneurs willing to carry offenders out of England.<sup>64</sup> Equally possible, some unrecorded process was being played out whereby suitable candidates were being earmarked during the trial process for respite and transportation as part of some ‘off-stage’ dialogue between an entrepreneur and the justices. That some such process was in play became apparent during the following January. This conclusion would suggest that during 1614 vagabonds, consistent with Ambassador Sarmiento’s observations, were being shipped to Bermuda. Felons, on the other hand, were being held for other purposes and their banishment from England involved more complex processes.

Additionally, the cases of 1614 point to another problem associated with the use of the respite in order to sentence felons to transportation to the Indies or Bermuda; this related to the legal status of the offender once the respite was in place. Was the respite to take effect as a suspension of the sentence, or was it to operate as something akin to a reprieve or a pardon? How long was the transportation order to remain in effect, and how could an offender once sent to

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<sup>63</sup> Brown, *The Genesis of the United States*, Volume 1, p. 682

<sup>64</sup> See the circumstances of Barnaby Littgold mentioned in Appendix 4 who was threatened with transportation to Greenland around the time that a fleet of ships from the Muscovy Company sailed from London for Spitzbergen.

Bermuda, return to England? What is apparent from these 1614 court processes was that the condemned felon's fate was entirely beyond his or her control. What was to become of their status if, due to circumstances beyond their control, no transportation took place; was the original sentence to remain respited, or was it necessary that it be reimposed? These issues appear to have been unresolved by the end of October 1614 when the last respites were mentioned in court records and no transportations under similar arrangements were set in train until 1617 by which time quite different legal devices were in place to address some of the shortcomings of the 1614 approach.

The commission issued to the Privy Council in 1614 followed closely the wording of that issued to the Council in 1602.<sup>65</sup> Citing increasing levels of crime, but the need to temper justice with mercy, King James explained that it 'is moste requisite some other speedy remedy be added' to capital punishment for felony. At the same time he thought it desirable that:

the lesser offenders adiudged by lawe to dye may in that manner be corrected that in their punishment some of them may live and yeild a profitable service to the Comon Wealth in parts abroade where it shall be found fitt to imploie them.<sup>66</sup>

The commission made no mention of any possible employer and went on to give the councillors power to 'appoynt, bestowe and committ' such reprieved felons upon any undertakings the Council sought fit, and for such period of time as they considered appropriate. The commission ended by setting out a procedure which was to be applied when a reprieve was allowed. According to the American historian Abbot Emerson Smith, the commission concluded by requiring:

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<sup>65</sup> Mary Anne Everett Green, ed., *Calendar of State Papers, Domestic Series, of the Reign of James I, 1611-1618*, (London: 1858), p. 270.

<sup>66</sup> AE Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century", *The American Historical Review*, 39 (1934), pp. 232-49, at p. 233.



... that all proceedings in accordance with this commission are to be certified by the principal secretary of state at the time, and "to be entered and enrolled on Record by the Clarke of our Crown in the Office called the Crowne Office" belonging to the court of king's bench.<sup>67</sup>

The open warrant was, therefore, a legal construct to provide free labour in terms to be determined by the Privy Council.<sup>68</sup>

Two days later, on 23 January 1614, the Open Warrant was issued by the Privy Council. The warrant claimed that its authority was derived from the commission which, it stated, was authorised 'under the Greate Seale of England' and which gave 'full power, warrant, and authoritie' to six or more members of the Privy Council 'to reprieve and stey from execucion suche persons as now stand convicted of anie robberie or fellonie ...'.<sup>69</sup>

Contemporary English law was quite precise about the roles of the various participants within the criminal justice system. In an era of mandatory sentencing, alleviated only by benefit of clergy or the king's pardon, the roles of the participants were clear: the judge was required to do his duty, and the sheriff his.<sup>70</sup> For a sheriff or gaoler to release a condemned felon to anyone other than the hangman, was an offence. The use of the warrant then had the effect of freeing the doer of the act, in this case the sheriff of London and the gaoler of Newgate, from blame or legal liability or responsibility. To this end the warrant closed with the

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<sup>67</sup> The text of this portion of the commission is included in Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century", p. 234.

<sup>68</sup> A warrant was the legal instrument by which the king or the Council was able to issue directions to law officers to do an act which might otherwise be unlawful.

<sup>69</sup> The full text of this open warrant is set out in H.C. Maxwell Lyte, ed., *The Acts of the Privy Council of England, 1615-1616*, (London, 1925), pp. 23-5.

<sup>70</sup> Matthew Hale, *The History of the Pleas of the Crown* (London, 1736), Volume I, p. 13. See also Section 8 of the Habeas Corpus Act, 31 Car II c. 2 to the same effect.

words, 'For doing whereof this, being according to his Majestie's comission, shalbe to him a sufficient warrant and discharge in that behalf.'<sup>71</sup>

The scheme contemplated by the commission of 1614 and implemented by the warrant was not open ended. In determining suitability for service abroad, the Councillors were entitled, if not expected, to rely upon written certificates from the trial judges. Other than the reference to 'strength of bodie or other abilities', reinforcing the notion of some communications between the justices and the East India Company, there was no indication given as to the criteria to be used by the judges in preparing such certificates.<sup>72</sup>

The warrant included a 'spetiall proviso' to the effect that if a reprieved offender refused to go where ordered, or having 'yealded' to go then returned before the expiry of the term set by the Council:

then the sayd reprivall shall no longer stand, nor be of anie force, but the said offendor, or offenders, shall from thenceforth be subject to the execucion of lawe, for the offence whereof hee was first convicted, as if nothing had bene donne by virtue of this comission.<sup>73</sup>

The wording of this 'spetiall proviso' was to become significant in the later use of transportations from England. What was stated here as the proviso to a reprieve was to become the understood meaning of the breach of a conditional pardon. It can reasonably be assumed that obtaining such a warrant for return would have been difficult for a person sent abroad by such arrangements and the implication was that the effective term of the banishment being created was to be perpetual.

This was, therefore, similar in effect to the provisions of Section IV of the statute

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<sup>71</sup> Maxwell Lyte, ed., *The Acts of the Privy Council of England, 1615-1616*, p. 25

<sup>72</sup> Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century", points out the difficulties associated with the status of the certificates and relating them to the reprieve warrants issued by the Privy Council, see p. 235.

<sup>73</sup> Maxwell Lyte, ed., *The Acts of the Privy Council of England, 1615-1616*, p. 24

39 Eliz I c. 4 imposing perpetual banishment upon dangerous or incorrigible vagabonds.

The warrant of 23 January 1614 was specific and concluded by designating seventeen named men, presumably from London since the certificate that the Council was relying on was provided by Sir Henry Montague, then the Recorder of London. The seventeen men were noted as ‘being persons of able bodies, and fit to be employed beyond the seas’. The seventeen named men had been convicted of ‘severall felonies’ but not of murder, rape, burglary, or witchcraft.<sup>74</sup> The warrant directed the ‘Highe Sheriffe’ of the county where the men ‘remayne’ to deliver them to Sir Thomas Smythe, the Governor of the East India Company, or his assigns, to be conveyed to the East Indies or elsewhere, as directed by Sir Thomas. There was no mention in the open warrant as to the purpose to which the reprieved men would be employed. The warrant of 23 January 1614 was signed by six people, members of the Privy Council, most of whom it can reasonably be concluded would derive some material benefit from the prosperity of the East India Company.<sup>75</sup>

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<sup>74</sup> One of the seventeen men, Augustine Callis or Callys, was convicted of burglary – see Appendix 4.

<sup>75</sup> The archbishop of Canterbury, George Abbot; the Lord Treasurer, Thomas Howard, Earl of Suffolk; Lord Wooten; Secretary Sir Ralph Winwood; Chancellor of the Exchequer, Sir Fulk Greville; and the Master of the Rolls, Sir Julius Caesar. Of these the archbishop does not appear to have received any direct benefit from the East India Company, although he was involved in the incorporation of the North West Passage Company in 1612. (Alexander Brown, *The Genesis of the United States*, (Boston, 1891), Volume 2, p. 811). The earl of Suffolk assisted in the incorporation of the North West Passage Company and received £200 from the Virginia Company (*ibid.* p. 928). Secretary Ralph Winwood had subscribed £75 to the Virginia Company and was a member of the Somers Island Company (*ibid.* pp. 1056-7). Chancellor Greville had been a consultant to Elizabeth I on the charter to the East India Company in 1600 and was admitted as a free (carried) member of both the Virginia Company and the East India Company in 1615 (*ibid.* pp. 905-6). Sir Julius Caesar was a member of the North West Passage Company and, in January 1617 was admitted as a free member of the East India Company. Sir Henry Montague, the Recorder of London in 1614 who certified the suitability of the seventeen men named in the open warrant, was to loan the East India Company £8,000 in 1616 (*ibid.* p. 951.)

The terms of the open warrant of 23 January 1614 are not without difficulty. The warrant, though described in the *Acts of the Privy Council* as ‘open’, was specifically directed to a High Sheriff.<sup>76</sup> It was not addressed to the seventeen reprieved offenders named in it and, would have had no status in a court unless the registration procedure set out in the King’s commission of 21 January were fully complied with. As Herrup has pointed out, a reprieve was not normally a document ‘on the record’.<sup>77</sup> However the procedure requiring the warrant to be registered in King’s Bench may have provided a way around this difficulty.

The particular utilisation of the open warrant of 23 January 1614 is of importance to the argument being developed here. To this end the men named in the open warrant are listed in Table 3. The names in italics were highlighted in Table 2.

**Table 3: Felons reprieved by the Open Warrant of 23 January 1614**

<i>Augustine Callis</i>	John Honyard
Robert Everatt	Edward Caldecot
<i>William Clarke</i>	Thomas Kichin
Thomas Burrowes	Benjamin Elet
<i>Robert Duffeild</i>	William Briggs
<i>Raphe Bateman</i>	<i>Able Metcalf</i>
Thomas Pitt	Edward Bland, &
Andrew Cole	Humphrey Skellicorne
<i>John Crosse</i>	

**Source:** H.C. Maxwell Lyte, ed., *The Acts of the Privy Council of England, 1615-1616*, (London, 1925), p. 25

Two days after the issue of the open warrant, on 25 January 1614, the same seventeen men were sent by the sheriff of London to the master of the East India Company ship *Dragon* due to sail to the East Indies under the overall command of

<sup>76</sup> Maxwell Lyte, ed., *The Acts of the Privy Council of England, 1615-1616*, p. 25

<sup>77</sup> Herrup, “Punishing Pardon”, p. 131

Captain William Keeling of the East India Company.<sup>78</sup> The Minutes of the Company noted:

Seventeen condemned men from Newgate sent down by the Sheriffs of London, and three of the most sufficient of “12 other voluntaries,” put aboard, “which was approved as a very charitable deed, and a means as was hoped to bring them to God by giving them time of repentance to crave pardon for their sins and reconcile themselves unto his favour.

The minutes are not clear whether the ‘very charitable deed’ was a reference to the receipt and carriage of the seventeen condemned men, or the three volunteers. The idea of personal redemption appears to relate to the reconciliation of the condemned men with God, and not with the King or the criminal justice system. Put another way, the views of Captain Keeling did not appear to open a way for the condemned men to be pardoned by earthly powers.

An explanation for these developments is to be found in an East India Company minute of two weeks earlier, dated 10 January 1614. This noted that the King had approved of a plan submitted by Sir Thomas Smythe in the following terms:

Motion of the Governor to the King for certain condemned men to be sent to the East Indies and left in certain places, according to occasion, upon discovery, His majesty very willing to further, “being a thing (in his opinion) which may do good and can do no hurt,” order given to have them delivered to the governor.<sup>79</sup>

The date when Smythe had approached the king is not clear; one possibility is that the dialogue could have commenced after Smythe received Thomas Aldworth’s letter in June 1614 mentioned above. Alternatively, though not necessarily mutually exclusively, the entire dialogue between the King and Sir Thomas had occurred in the days immediately preceding the issue of the King’s commission to

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<sup>78</sup> Sainsbury, ed., *Calendar of State Papers, Colonial Series, East Indies, China and Japan 1513-1616*, pp. 363-376, Minute No. 889.

<sup>79</sup> W Noel Sainsbury, ed., *Calendar of State Papers, Colonial Series, East Indies, China and Japan 1513-1616*, (London, 1862), p. 368, Minute 871.

the Council during the final weeks of January 1614 precipitated by the imminent departure of an East India Company fleet at the end of January 1614, under the command of Captain William Keeling, to India.<sup>80</sup> The fleet was also to carry Sir Thomas Roe, King James's newly appointed ambassador to the Great Mogul at Agra, in India, to establish his embassy.

The embarkation of the condemned men raises more questions about the reprieve process. Seventeen of the men had been named in the open warrant, but the three 'voluntaryes' had not; the legal process applicable to the removal of these men was not specified. Whether there had been a further open warrant cannot be clearly ascertained without access to records in England. The Company minute suggested that three out of twelve volunteers had been selected for embarkation. What process had been put in place to call for volunteers and then select three out of twelve is not clear, although it is reminiscent of the commission utilised by the Privy Council in 1586 to select condemned men for the galleys. Whether the three volunteers received any protection or cautions about returning to England is not known.

The purpose to which the condemned men would be deployed, reminiscent of the 1577 intentions of Martin Frobisher, that is, to be 'left in certain places according to occasion, upon discovery', was set out in the initial Company minute which, as stated, was also approved of by the King. Captain Walter Peyton, one of the fleet captains, elaborated a little further in his journal on that purpose in the following terms; 'the condemned 'persons' were put aboard 'to be left for the discovery of

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<sup>80</sup> There is some doubt about the senior officer commanding this fleet; Captain William Keeling or Captain Newport. See Robert Kerr, ed., *A General History and Collection of the Voyages and Travels, Arranged in Systematic Order* (Edinburgh, 1824), p. 218. Kerr's view is utilised here. The principal journal was maintained by Captain Walter Peyton.

unknown places, the company having obtained their pardons from the king for this purpose'.<sup>81</sup> The travels of Captain William Keeling and the specific fate of the men condemned men who travelled with him to India and the East Indies are beyond the scope of this thesis, but the following evidence is suggestive.

The fleet sailed from the Downs on 23 February 1614 and arrived at Saldanha Bay on 5 June 1615. The fleet departed on 20 June 1615 after having put ten of the condemned men ashore. The ten men are named in an East India Company journal making it possible to conclude that seven of them had been reprieved by means of the open warrant of 23 January 1614. The evidence suggests that Ambassador Roe, en route to Agra, had disapproved of the proposed course of action of putting the men ashore and had appealed to Captain Keeling not to proceed. Keeling, apparently unmoved by the ambassador's request, proceeded with the plan nevertheless, but handed two more of the condemned men into the custody of the ambassador and they accompanied him on to Agra.<sup>82</sup> Nine (or possibly ten) men were placed ashore in what was to be an uncertain future. Within a few days they had retreated from hostile Hottentot natives to the safety of Penguin (now Robben) Island and the survivors remained there until they were rescued a year later, when three were returned to England.<sup>83</sup> Whatever the intentions of the proposed settlement, it had clearly failed within a few days.

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<sup>81</sup> Kerr, ed., *A General History and Collection of the Voyages and Travels*, p. 220. Peyton's use of 'pardon' is the only use of the word in this entire narrative. There is no evidence that King James had pardoned the men, as opposed to empowering the Privy Council to reprieve them.

<sup>82</sup> The events described in this paragraph and the following two paragraphs are derived from materials published in Kerr, ed., *A General History and Collection of the Voyages and Travels*, Foster, *The Voyage of Thomas Best to the East Indies 1612-1614*, and Edward Terry, *A Voyage to East India' Wherein Some Things Are Taken Note of, in Our Passage Thither*, (London, 1777). Sir Thomas Roe's biographer seemed to suggest that the three volunteers were not reprieved felons. See Michael Strachan, *Sir Thomas Roe 1581-1644: A Life* (Salisbury, 1989), p. 68.

<sup>83</sup> The three returned men fled custody on reaching England and were arrested at Sandwich in Kent on charges of stealing a purse. But the men were condemned and hanged, apparently after

The placement of men at Saldanha Bay was attempted again in 1616, but in circumstances which must be assessed as a misunderstanding. Before news of the failure of the initial party had reached England, a further three men were named in the second open warrant to be issued by the Privy Council, this one on 7 July 1615. The three men were taken to Saldanha Bay and left there on 27 June 1616, despite the fact that there was no operable settlement at which to leave them. These men, eventually, and successfully, pleaded with the officers of the East India Company to be taken back into the fleet, which they were at the end of June 1616.

The ultimate fate of these three men, and that of the seven men not abandoned at Saldanha Bay in 1615, is unknown, raising questions as to the exact intentions of the East India Company and Sir Thomas Smythe in acquiring the condemned men in the first place. How were they to be deployed in the interests of discovery? Why are their circumstances not recorded in the otherwise detailed records of the East India Company made later? What is evident is that Sir Thomas Smythe and his assigns were being given absolute powers in respect of the disposition and employment of the condemned men, powers which appeared to mirror the powers that James I was purporting to exercise in disposing of the men into the services of the East India Company. The dilemma, for the purposes of this thesis, is that the nature of that power was never defined. King James and the officers of the

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communications with Chief Justice Coke, not on the new charges, but against the original sentences, it being noted that they had breached the terms of the reprieve. The fate of the two condemned men who travelled to Agra with Ambassador Roe was equally problematic, though less fatal. One of the men fled before returning to England while the other, John Duffield, on reaching England stole some of the ambassador's plate and disappeared. A reason why both men should have absconded could possibly have been due to the terms of the reprieve. Without Sir Thomas Smythe or Ambassador Roe to recommend their return, even without stealing a purse, both men would have faced the gallows. There is no record of any moves being made in advance to obtain the necessary licence.



East India Company behaved as if the open warrant conveyed the power of life and death over the reprieved felons.

The use of the open warrant, that is, an exercise of the prerogative, was to continue over the next ten years. Between January 1614 and February 1620 it was used exclusively for the benefit of Sir Thomas Smythe. A listing of the recorded details of open warrants used between 23 January 1614 and 19 November 1624 is contained in Appendix 5. This material clearly demonstrates that after the initial warrant of 23 January 1614 it was not used again until 7 July 1615 (some six months later) when two warrants were issued on the same day. As mentioned above, three of the named men were sent to Saldanha Bay, but the destination of the other three was not specified. Then, after a further twenty months interval, one man was reprieved by open warrant in March 1616, and four months later five men were reprieved on 13 July 1617. While centred on London, men were being identified from as far afield as Canterbury and Oxford. Support for the general nature of Smythe's powers with regard to the supply of condemned felons is to be found in a further observation of the Spanish ambassador. Writing to Philip III in Spain on 7 December 1616, Ambassador Sarmiento reported, 'for the President of the Company of these Colonies, having authority here to take for their benefit any prisoners he chooses among those who have been condemned for criminal causes'.<sup>84</sup>

The comparatively limited use of the open warrant in these circumstances supports the argument that the open warrants at this time were being used to reprieve targeted men from southern England for the special benefit of Sir

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<sup>84</sup> Brown, *The Genesis of the United State*, Volume 2, p. 900.

Thomas Smythe.<sup>85</sup> This was, then, a demand based system. The reprieves in question would, most likely, never have been issued had there not been a demand from the East India Company. It is difficult then, from this argument, to conclude that the process of the open warrant amounted to the commencement of the punishment of transportation from England.<sup>86</sup> Instead, the circumstances suggest a personal benefit being made available to Sir Thomas Smythe and, more generally, for the economic advantage of the East India Company and its members.

A more tenable argument for the commencement of transportation can be found from events which occurred shortly after. In 1619 Sir Thomas Smythe resigned as treasurer of the Virginia Company of London although he remained in his position in the East India Company. The background for these events is mentioned in Chapter 1. After Smythe's departure evidence of small number of offenders being sent to destinations in Bermuda, or the possible deployment of reprieved felons in the military forces in mainland Europe becomes more evident. Of those sent to Virginia and Bermuda, it is apparent that the intended purpose was that the reprieved offenders should be servants. On 2 May 1622 an open warrant named 'Daniell Frank', with two others, who was to be sent to the service of the Governor of the Virginia Company 'with all speed'.<sup>87</sup> But on 5 September 1622 the Court of the Virginia Company approved 'Dan ffranke' being sent to Virginia having contracted to be in the service of Elianor Phillipps; 'that nowe goes ouer with him, whereof the said Phillipps offers to pay for his passage if the Companie

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<sup>85</sup> There were no women mentioned in the open warrants until October 1618 – see Appendix 5.

<sup>86</sup> This argument was posed, with caution, by Smith in 1934 but more assertively by Maxwell-Stewart in 2010. See Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century", p. 236 and Hamish Maxwell-Stewart, "Convict Transportation from Britain and Ireland 1615-1870," *History Compass*, 8 (2010), pp. 1221-1242, at p. 1221.

<sup>87</sup> A.E. Stamp, ed., *The Acts of the Privy Council of England, 1621-1623*, (London: 1932), p. 344.

please to permit the said ffrancke to goe.<sup>88</sup> The deployment of reprieved felons to Virginia and Bermuda after 1620 appears to have been utilised in order to identify suitable servants for use in the emerging colony, although the transported offenders were still subject to the restraint of not returning to England except with the licence of the Privy Council.

To summarise the use of the open warrant process created in 1614; it would appear, from the evidence, to have been almost exclusively connected with the requirements of Sir Thomas Smythe, initially with the East India Company, and then with the Virginia Company. Smythe's departure from the treasurership of the Virginia Company in 1619 marked the beginning of a break with the practice and the emergence of a wider use of the reprieve to make cheap or free labour available to other colonial entrepreneurs. It also saw reprieved felons, albeit in small numbers, being sent to Virginia in order to labour in the private service of individual colonial settlers.

The subsequent use of the process of the open warrant, although no longer significant for the purposes of this thesis, is summarised in Appendix 7. The original commission of James I of 21 January 1614 had named the specific members of the Privy Council committee. Subsequent changes to membership required the creation of a new commission. The evidence of this occurring is demonstrated in the Appendix.<sup>89</sup>

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<sup>88</sup> Susan Myra Kingsbury, ed., *The Records of the Virginia Company of London*, Volume 2 (Washington, 1906), p. 102.

<sup>89</sup> Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century", argued there were six amendments to the commission; p. 94. This research indicates around nineteen such amendments.

Further evidence of a change in the use of the prerogative in connection with sending offenders out of England occurred in April 1620. On 11 April, at the direction of King James, the Privy Council wrote to Sir Thomas Smythe. The letter notified Sir Thomas (although no longer associated with the Bermuda Company) that the King:

hath now under his pardon many condemned persons of both sexes, And out of his singular mercie is graciously inclyned rather to send them to some forrayne plantation, and more particularly for the Sommer Islandes, than here to suffer the law to take the forfeiture of their Lives<sup>90</sup>

The Council required Smythe ‘to take presently into your care, the transportation of some 20 of them, either all women, or 10 men, and 10 women as you shall best approve unto the said Islands’. The Council, seemingly keen to have the business completed at the earliest opportunity, advised Smythe that a warrant would be issued from the Council ‘by virtue of a Commission dormant under the great Seale’ as soon as Sir Thomas was ready to receive the ‘condemned persons’.

The Privy Council’s letter illustrates the problem of interpreting contemporary records. The Council referred to the condemned persons as being ‘now under his [the King’s] pardon’. Since the letter went on to suggest that transportation to the Sommer Islands would be preferable to their being hanged, it must be inferred that the status of the condemned persons was that they were currently subject to some form of temporary respite and had not, in fact, been pardoned.<sup>91</sup>

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<sup>90</sup> AE Stamp, ed., *The Acts of the Privy Council of England, 1619-1621*, (London, 1930), p. 175.

<sup>91</sup> In any event, there is no record of any transportation taking place as a result of the Council’s letter although there is a record in the *Calendar of State Papers, Domestic*, for 1619-1623, which may contain the sequel. On 20 November 1622 there is a record of the issue of a pardon under the king’s sign manual to the effect that Francis Battersey and 67 other persons (sixty-six at Newgate, and one at Bristol) who had been ‘reprieved on sundry considerations’ at some time in the past. But, in the circumstances of an outbreak of an infection (presumably within Newgate prison), the king and the Council ‘were reluctant to order them, having been long spared, to execution’. Instead, the sixty-eight men and women were pardoned ‘with the proviso of their being employed

The Privy Council's letter of 11 April 1620 is significant. Prior to April 1620 the Crown and the council appear to have been only passive respondents to requests from Sir Thomas Smythe for identified victims of the criminal justice system to be made available to him (or his assigns). As stated above, it is difficult to contemplate such a mechanism as being the origins of the punishment of transportation; the connection between reprieve and transportation was entirely dependent upon the intercession of Sir Thomas Smythe. The letter of 11 April 1620, however, marks a shift to the position where the Crown and the council appeared eager to make condemned felons available to anyone who wanted them and would take them from England. The process was thus moving from a demand driven (or pull) basis of supply to a supply driven (or push) system of transportation as a punishment. While transportation still depended upon the capability of a party to physically transport an offender out of England, the origins of the criminal justice system's use of transportation as a punishment would appear to be better grounded in the Privy Council's letter of 11 April 1620 than in the open warrant of 23 January 1614. Without any common law or statutory basis for touting condemned felons for disposal, King James developed an enlarged use of the prerogative. Interestingly, at a time when other uses by James of his claims to prerogative power, e.g. the raising of taxes without the approval of parliament, moves which were objected to by members of parliament, in this instance, James appears to have been able to make these moves without objection from parliamentarians, lawyers, or the judges.

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on certain works, or sent abroad'. Whether this further move resulted in transportation is not recorded. Mary Anne Everett Green, ed., *Calendar of State Papers, Domestic Series, of the Reign of James I, 1619-1623*, (London, 1858), p. 462.

While the use of the open warrant process continued after the letter of 11 April 1620, two further developments occurred in 1622 which came to shape the future of transportation by use of the prerogative. The first was the deployment of reprieved felons in England at hard labour; the second was the first use (as such) of the conditional pardon. Unfortunately, there is little supporting information to explain the origins of either of these developments. On 2 September 1622, the King issued a new commission to the Privy Council to reprieve felons already condemned. The form was similar to that of 1614 but an additional measure was added. This was to the effect that, at the Privy Council's discretion, instead of being sent abroad in accordance with the former commission (of 1614), reprieved offenders might be:

otherwise constrained to toyle in some such heavie and painefull manuall works and labours here at home and be kept in chaynes in the houses of correction or other places, as shalbe thought fit, with food and rayment for necessitie of life and no more<sup>92</sup>

The revised commission went on to suggest that hard labour in England would add to the utilitarian effect of such a punishment:

so that their service may be usefull and beneficiall to the commonwealth, which servitude, as it is conceived, wilbe a greater terror than death itself and therefore a better example, sithence execucions are so common as that wicked and irreligious sorte of people are no way thereby moved or deterred from offending

The possibility of relief was offered:

none of the said prisoners are to be freed from that servitude but to be kept under the sword of justice and to be cut off when his majestie shall please, save only such as upon certificate of good demeanor and penitence for their former faultes and securitie given for their good behaviour for the future his Majestie shall be pleased to release and pardon.

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<sup>92</sup> Stamp, ed., *The Acts of the Privy Council of England, 1621-1623*, p. 294.

It would be a useful inquiry to ascertain whether the possibility held out of release and pardon was intended to overcome the deficiencies of the circumstances left unresolved in 1614 and the circumstances of the men released into the custody of Sir Thomas Smythe. Redemption, in the eyes of the criminal justice system, replaced redemption by God. It is interesting to note that the two extracts of the King's commission mark the first use of the concept of 'servitude' as amounting to a punishment.

There is no evidence to show how the use of hard labour was utilised.<sup>93</sup> However, and useful for the purposes of this thesis, the conceptualisation of hard labour in the 1622 commission to the Privy Council raised the question whether the description of hard labour was the definition of a new form of punishment, or whether what was being put into words was what was already contemplated as being the essential features of transportation and work abroad applying to all reprieved offenders transported from England prior to November 1622. There is no real way of resolving this query.

Around the same time in 1622, James I unexpectedly used a form of conditional pardon. The circumstances were noted in 1934 by Abbot Emerson Smith who dated the pardon at 1 February 1623 (he is unclear whether this was old or new system dating), and believed that it applied to 'sixty persons' who were pardoned under the Great Seal, but subject to the following qualification:

... [this] is, however, ever the condition and our intention, and thus by these presents we decree and command that each and every person mentioned earlier in the presents ... will be

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<sup>93</sup> Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (New York, 1971), pp. 358-9. Smith took the view that there was only one instance of this new device being put into operation. This involved 68 felons from Newgate who were pardoned in November 1622 and put to work on a specific, but unnamed, project in England.

restrained, deported and settled elsewhere ... to such employment, work and service either in overseas places or within our territories being made and pursued, and for such time or such times as some six [years] or more [as] as will seem better expedient according to our Privy Council.<sup>94</sup>

Regrettably, there is no explanation as to why this 1622 form of pardon should use the formula of a conditional pardon that was not to re-appear until 1655 under Cromwell and the Protectorate.

In 1634 the use of the open warrant was abandoned. The reason for this is not entirely clear. Smith thought that the old method had proved 'too cumbersome or the Council too unenthusiastic' to maintain.<sup>95</sup> It was replaced by a much simpler procedure of the King, Charles I, authorising the reprieve and transportation of condemned felons under the king's own warrant under the sign manual.<sup>96</sup> Under this more effective and quicker process, Smith argued, more than sixty felons were reprieved and sent to America. There are six records in the *Calendars of State Papers* which identify the use of this new procedure in 1635, 1636, 1639 (2), and 1640 (2). These are summarised in Appendix 5.

In the absence of a commission to the Privy Council, there was no statement of intention behind the use of the king's own warrant. From the *State Papers* it is evident that the only condition thought relevant to mention was that a transported felon who returned without a licence would be executed. No time limit is given for any of these transportations so the term must be presumed to have been perpetual. Three of the records, those of 1635, 1636, and 1639, specified that the

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<sup>94</sup> Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century". I am grateful to Michael Berry of the University of Tasmania for this 2010 translation from the original Latin text.

<sup>95</sup> Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776*, p. 94

<sup>96</sup> The 'sign manual' referred to an instrument which took its authority from the personal signature of the monarch, as opposed to the use of a seal. The use of the sign manual and the authority it conveyed is considered later in the thesis.



reprieved felons were to be transported to Virginia. Two of the records, those of 1639 and 1640, specified that the reprieved felons were to be transported to St. Christopher's Island (St. Kitts). The remaining record specified that the reprieved felons were to be delivered into the custody of Captain Philip Bell, and were probably sent to St. Kitts.<sup>97</sup> Except for the last record, the process utilising the king's warrant suggests custody passing to a ship's captain or person with colonial interests. The process under Charles I therefore, was not dissimilar to the open warrant used by James I. Nothing was stated about the purpose for which the transportation had been ordered and nothing was stated as to how the person of the transported offender should be used. The only conclusion possible is that transported offenders were to be utilised as labourers or servants at the point of destination. Whether they were to be subjected to the regime written down as defining hard labour in the 1622 commission of James I is unknown.

During the reigns of James I and Charles I (1603-1649), from the available evidence, less than 200 men and women were expatriated from England by use of the prerogative. The numbers, calculated from Coldham's work in this area and from the *Calendar of State Papers, Domestic*, are set out in Appendix 6.

From the forgoing analysis of the use of statutes and the prerogative, the two questions considered in this Chapter; that is, why and how did contemporary statutes enable transportation before 1717, and how had transportation emerged from the exercise of the prerogative prior to 1717, can be resolved in the following terms.

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<sup>97</sup> AE Smith suggests that Captain Bell was the governor of St Kitts. See Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776*, p. 95.

Transportation authorised by statute had initially been directed at the banishment of offenders who, in 1597, had been identified as rogues, vagabonds, and sturdy beggars. This was a class of offenders, not felons, who were objects of legal punishment simply because they displayed no propensity to labour or to conform to the norms of the early modern perception of a hierarchical England as described by Sir Thomas Smith in 1586. Their treatment had its origins in the Tudor practice of sending such offenders back to their place of origin to be put to work. Sending them home, at least to Tudor and Jacobean legislators, solved a social issue and returned delinquents to where they would labour for a master. The punishment of transportation evolved into a trans-Atlantic extension of this practice.

The English Civil Wars did not alter the processes of transportation, although it brought about significant increases in numbers, particularly defeated royalist soldiers. While prior transportations had involved felons and offenders from the lower and less articulate classes of society, transported soldiers who, after 1660, ended up on the winning side, stretched both an understanding of transportation and stressed the need for the processes of transportation to be on solid legal grounds. The Long Parliament (May 1661- December 1678) enacted five statutes authorising the transportation of religious non-conformists, Quakers, raiders from the English/Scottish borders and, in 1670, in a new experiment, the transportation of felons convicted of a narrow range of crimes against property in circumstances where, prior to the enactments, offenders would have been hanged. At the same time, however, in an attempt to forestall the increasing power of the executive and to ensure some freedoms for English subjects parliament also passed *An Act for*

*the better security of the Liberty of the Subject and for prevention of Imprisonment beyond the Seas*, better known as the Habeas Corpus Act 1679.<sup>98</sup>

By use of the prerogative, initially for the purposes of the East India Company, and again under differences in language and usage, after around 1620, felons were reprieved or pardoned and shipped as servants for the benefit of merchants with influence at, or at least access to, the royal court where the prerogative of mercy was exercised, initially by committees of the Privy Council and then by the monarch. During the 1620s, while the different processes of sentence or reprieve had different origins, the differences conflated into a more or less uniform process and a unitary outcome: the offender was transported to America in order to labour for a colonial master, there to be dealt with in accordance with the laws of Virginia. As demonstrated in Chapter 1, that law treated them as servants arriving without indentures and required them to serve terms of servitude of five years, irrespective of the term, if any, imposed in England.

Now, with an understanding of how offenders transported to Virginia were treated by the colonial authorities, and an appreciation of legislative and prerogative powers utilised in England to authorise those transportations, it is appropriate to turn to the enactment of 4 Geo I c. 11 in 1717.

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<sup>98</sup> The statute 31 Car II c. c.

### Chapter 3: The enactment of 4 Geo I c. 11 in 1717

The central research question addressed in this thesis asks; what was the meaning of the formula that first appeared in the 1717 statute 4 Geo I c. 11 whereby the contractor undertaking the transportation of an offender to America acquired ‘a property and interest in the services’ of that offender? In this Chapter, the provisions of the statute 4 Geo I c. 11 are considered through three questions: first, how did the statute 4 Geo I c. 11, and the inclusions of the formula ‘a property and interest in the service of the offender’ meet the circumstances of the time? Second, how did the laws authorising transportation from England evolve after 1717? Third, how did the British government respond to the disruption to transportation brought about by the American War of Independence? Addressing the first of these questions: how did the statute 4 Geo I c. 11, and the inclusions of the formula ‘a property and interest in the service of the offender’ meet the circumstances of the time?

George I’s third parliament assembled at Westminster on 21 November 1717. On 23 December, the House of Commons gave leave to the Solicitor-General, Sir William Thomson, to introduce *a bill for the further preventing Robberies, Burglaries, and other Felonies, and for the more effectual Transportation of Felons*.<sup>1</sup> A committee, chaired by Thomson, was appointed to ‘prepare and bring in the same’. In addition to Thomson, who was also the recorder of London, the committee comprised the Lord Mayor of London (Sir William Lewen), and four others; Sir John Ward, Sir Thomas Scawan, William Heysham, and Peter

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<sup>1</sup> *Journal of the House of Commons* (hereinafter *JHC*), Volume 18, (1714-1718), p. 667. No mention was made either about two issues that would later appear in the eventual long title to the final legislation; the unlawful export of wool, or the law with respect to pirates.

Godfrey, all from London.<sup>2</sup> Beattie has noted that Sir William Thomson had obtained the approval of the court of aldermen to an early draft of the bill.<sup>3</sup> The connection between Thomson and the concerns of the City of London and the magistrates of London has an important role in the initial evolution of the legislation. Thomson's role as Solicitor-General also opens up the possibility of a government involvement in the development of the bill. Beattie argued that Thomson's political association with the Whigs and his interest in the management of crime and punishment within the city placed considerable initiative in Thomson's hands. Beattie also cast Thomson as a Mr fix-it; ambitious, capable, and ideally placed to manage the legislative solution to contemporary problems, especially in London.<sup>4</sup> Beattie's view is not contested here but, instead, a more nuanced view is offered, admitting the possible contribution of other players within George I's third parliament. Since no copy of Thomson's original bill or of its subsequent evolution within the parliament survives, it is only possible here to draw speculative conclusions, as Beattie did.

On 20 January 1717 the bill was read to the Commons a second time and the committee increased in size by the addition of Sir Thomas Johnson, the member for Liverpool, the Attorney-General (Sir John Northey), all the members of the

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<sup>2</sup> Sir William Lewen and Sir Thomas Scawan were aldermen of the City of London, of which Sir William Thomson was also recorder. Sir John Ward succeeded Sir William Lewen as lord mayor of London and, between 1715 and 1716 was Sheriff of London. Heysham and Godfrey were both London merchants, Godfrey, along with Sir John Ward, was a director of the East India Company and of the Bank of England. Biographical information on the members of the committee is drawn from the History of Parliament website: <http://www.historyofparliamentonline.org>, accessed 1 February 2012.

<sup>3</sup> JM Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford, 2001), p. 429. As stated in Beattie, the court of aldermen may have been requesting Thomson to take the matter to the parliament. The minutes of the Court of Repertories makes it clear that Thomson read a draft of an act of parliament to the Court, but no copy of the text is available. London Metropolitan Archive COL/CA, Court of Repertories, Rep. 122, folios 73-4.

<sup>4</sup> Beattie, *Policing and Punishment in London, 1660-1750*, p. 431.

House of Commons from the counties of Middlesex and Surrey, from the City of London, and all the ‘Gentlemen of the Long Robe’ (i.e. the lawyers in the Commons).<sup>5</sup> Sir Thomas Johnson’s inclusion may have been an obvious choice. In addition to being the member for Liverpool, Johnson was also the Mayor of that city and had played a central role in events during 1715-6 which are examined below. The expanded committee made several amendments to the bill and these were reported back to the Commons on 22 January and debated the following day and agreed.<sup>6</sup>

The House of Lords, while approving the overall arrangements, required two amendments.<sup>7</sup> First, it sought to clarify some aspects of the law of piracy, both in the text, and in the long title. Second, another amendment had the effect of excluding the application of the bill to Scotland. No reasons for this second amendment were stated, but there was some antipathy in Scotland to the practice of transportation.<sup>8</sup> Deliberations on the bill and negotiations on the amendments between the Lords and the Commons continued until the final day of the session on 21 March 1717 when the amendments proposed by the Lords were accepted by the Commons and the bill received royal assent. Beattie noted that the act ‘was an

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<sup>5</sup> *JHC* Volume 18 (1714-1718), p. 675. The two positions of the attorney general and the solicitor general were often referred to as ‘the law officers of the crown’. This joint role of the two office-holders in December 1719 becomes relevant later in the part with respect to the Irish transportation legislation.

<sup>6</sup> *JHC* Volume 18 (1714-1718), pp. 684, 686, and 691.

<sup>7</sup> A third amendment was also sought which would have made deer-stealing an offence punishable by transportation. This was eventually rejected by the Commons in the lead-up to the bill receiving royal assent. It opened up the subsequent practice of later sessions of parliament adding to the list of crimes for which the punishment was transportation.

<sup>8</sup> The consideration of the Lords’ amendments by the Commons’ is set out in *JHC*, Volume 18 (1714-1718) as follows: 14 March 1717 at pp. 763 and 764; 17 March at p. 765; 18 March at p. 768; 19 March at pp. 768-9; and 20 March at pp. 769-70. One reason why the bill may have excluded Scotland is considered in Chapter 6.

entirely new departure in criminal administration'.<sup>9</sup> As will be demonstrated, sometimes the act has been endowed with characteristics which are not supported by the text, but which become evident from careful analysis. The content of the new act will be examined below, but it would be useful to put the events leading up to its enactment into context.

On 6 September 1715, John Erskine, the Earl of Mar, proclaimed James Stuart King of Great Britain at Braemar in Scotland. The resulting rebellion was soon suppressed. But, at a wider level, George I's government faced not just civil and political disorder, but what was perceived to be increasing levels of crime particularly in London, and particularly in the period following the end of Britain's involvement in the War of the Spanish Succession and the Treaties of Utrecht in 1713.<sup>10</sup> In 1966, Shaw argued that transportation was the product of English criminal law and the need to supply the colonies with labour. Beattie went further, adding the statistical dimensions to demonstrate an increase in the conviction rate of soldiers and sailors who had returned to England without prospects of employment.<sup>11</sup> Beattie's arguments were followed by Ekirch in 1987 and Maxwell-Stewart in 2010.<sup>12</sup> In 1992 Coldham added the obvious additional point that, due to the rising levels of crime, the gaols (particularly those in

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<sup>9</sup> Beattie, *Policing and Punishment in London, 1660-1750*, p. 428. Sir William Holdsworth described the statute as 'a turning-point in the history of the punishment of transportation.'

Holdsworth, W., *A History of English Law, Volume XI* (London, 1938, reprint 1978), p. 573.

<sup>10</sup> AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire*, (London, 1966), p. 110; Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford, 1987), p. 25.

<sup>11</sup> Beattie, *Crime and the Courts in England 1660-1800*, pp. 501-2 and JM Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford, 2001), pp. 427-8.

<sup>12</sup> Shaw, *Convicts and the Colonies*, p. 17; H Maxwell-Stewart, "Convict Transportation from Britain and Ireland 1615-1870", *History Compass*, 8 (2010), pp. 1221-1242, at p. 1230.

London) were full to overflowing.<sup>13</sup> At the same time, increases in crimes against property left the justices in quarter session and at the Old Bailey little opportunity for flexibility in administering suitable punishments. The mandatory punishment for felony was death unless the processes of the justice system could be manipulated to rely upon condemnation followed by conditional pardon and transportation.<sup>14</sup> In this climate of trying to develop a suitable and proportionate punishment for rising levels of property crime, while, at the same time, avoiding further exacerbation of public disorder with too many hangings, George I's third parliament had convened. And it was in this context that the parliament, or more probably the Solicitor-General, looked to reviving the use of transportation.<sup>15</sup>

In Chapter 2 it was demonstrated that transportation from England as a statutory punishment had been used, in one form or another, since the 1660s, but was limited to a small number of offences. The greater utilisation of transportation had developed from the use of the prerogative, first in releasing felons from the gaols to work for third parties abroad, and then by the use of conditional pardons.<sup>16</sup> This use of the prerogative, however, had had the effect of shifting the utilisation of the punishment from the public theatre of the courts to the private deliberations of the King in council and the monarchic exercise of the prerogative. In addition, transportation, when it did occur, had no general processes of oversight or

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<sup>13</sup> PW Coldham, *Emigrants in Chains: A Social History of Forced Emigration to the Americas 1607-1776* (Baltimore, 1992), p. 59.

<sup>14</sup> Beattie, *Crime and the Courts in England 1660-1800*, pp. 543-4. Beattie here is describing the utilisation of transportation during the 1750s and later but the point is apposite. More importantly, it imposed risks for the offender being encouraged to plead guilty and not being pardoned. See also Beattie's observations about what he referred to as 'manipulation of clergy' to bring about transportation; p. 478.

<sup>15</sup> Beattie, *Policing and Punishment in London, 1660-1750*, p. 428. Beattie revised his earlier evaluation of the role of Thomson in the development of 4 Geo I c. 11 and its subsequent implementation and administration, especially from London. See p. 431.

<sup>16</sup> Beattie, *Crime and the Courts in England 1660-1800*, pp. 500-502.



supervision. Different contractors carried small numbers of offenders to America without system.<sup>17</sup>

During the period leading up to George I's third parliament there were two other relevant developments. One touched directly upon the status of transported offenders, while the other raised the issue of government subsidy. The first development arose out of the Jacobite rebellion. The Earl of Mar's proclamation of James Stuart as King of Great Britain in September in 1715 resulted in the raising of a Scottish army, intent on invading England. Following some ineffectual military manoeuvrings in the Scottish lowlands, in mid-September Scottish forces entered England to converge on Liverpool with a force of English Jacobite supporters. On 9 November 1715 the mixed Scottish-English rebels entered Preston in Lancashire, where they were promptly surrounded by troops loyal to George I under the command of General Charles Wills. Having no prospects, the Jacobite rebels surrendered unconditionally to Wills on 14 November.<sup>18</sup>

The Jacobite surrender placed some 1,468 prisoners (463 Englishmen and 1,005 Scots) in government hands. Rather than manage the prisoners as defeated soldiers to be punished according to martial law, the government chose instead to deal with them through the criminal justice system. Commissions of Oyer and Terminer were prepared and three judges from Westminster travelled to Liverpool to try the prisoners. Proceedings commenced on 12 January 1715 and continued

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<sup>17</sup> Ekirch, *Bound for America*, p. 70.

<sup>18</sup> Bruce Lenman, *The Jacobite Risings in Britain, 1689-1746* (London, 1980), p. 23. See also the useful analysis of these events in Margaret Sankey, *Jacobite Prisoners of the 1715 Rebellion: Preventing and Punishing Insurrection in Early Hanoverian Britain* (Aldershot, 2005), Chapter 4.

through until 9 February.<sup>19</sup> On 28 February 1715 four rebels were executed at Liverpool, causing many of the remaining prisoners to plead guilty and petition the king to be transported.<sup>20</sup>

Anticipating the use of transportation against the Jacobite rebels, on 28 January 1715, the mayor of Liverpool, Sir Thomas Johnson submitted a proposal to the Lords of His Majesty's Treasury to transport the rebels to America at 40s. per head. Johnson was a merchant engaged in the sugar, salt, and tobacco trades and, in 1701, had been elected a member of parliament for Liverpool.<sup>21</sup> As part of his proposal to the Treasury, and reflecting the transportation practices developed during the second-half of the seventeenth century, Johnson required that it be a condition of his arrangement that the rebels were to 'serve' Sir Thomas or his assigns, in any of his Majesty's plantations for a period of seven years.<sup>22</sup> An agreement between the Lords of the Treasury and Johnson was signed on 16 April 1716 for the transportation of 'rebels or prisoners' from any of the gaols of Chester, Liverpool, or Lancaster to the plantations in America.<sup>23</sup> The essential

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<sup>19</sup> Some of the difficulties faced by the government in conducting treason trials against the rebels are examined in Chapter 5 of G Morgan and P Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London, 2013).

<sup>20</sup> Arthur C Wardle, "Sir Thomas Johnson and the Jacobite Rebels," *Transactions of the Historical Society of Lancashire and Cheshire*, 91 (1939), p. 126. Wardle's article provides a useful description of these events. Some 34 rebels were eventually executed around the country. See *Calendar of Treasury Papers 1714-1719* (London, 1883), p. 225 [Volume CC, item 11]. See also Morgan and Rushton, *Banishment in the Early Atlantic World*, pp. 81-9. Morgan and Rushton do not cite Wardle's article.

<sup>21</sup> Johnson remained in the parliament until 1722. Richard D. Harrison, 'Johnson, Sir Thomas (bap. 1664, d. 1728)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/14921>, accessed 14 Dec 2012].

<sup>22</sup> *Calendar of Treasury Papers 1714-1719* (London, 1883), p. 196 [Volume CXCVIII, item 54]. Johnson was paid £1,000 towards the cost in April 1716. *Ibid.* p. 216. A final payment of £278 was paid in March 1717, 'Treasury Warrants: March 1717, 16-25', in *Calendar of Treasury Books, Volume 31, 1717*, ed. William A Shaw and F H Slingsby (London, 1960), pp. 192-210 <http://www.british-history.ac.uk/cal-treasury-books/vol31/pp192-210> [accessed 25 December 2015].

<sup>23</sup> 'Treasury Warrants: April 1716, 16-20', in *Calendar of Treasury Books, Volume 30, 1716*, ed. William A Shaw and F H Slingsby (London, 1958), pp. 189-205 <http://www.british-history.ac.uk/cal-treasury-books/vol30/pp189-205> [accessed 30 December 2015].

element of these shipping contracts contemplated that the offenders undergoing transportation were to be turned into servants once they reached America.

However, Johnson had not anticipated the truculent opposition to transportation from some of the rebels. In a letter written by one rebel in Chester Gaol at the end of April 1716, while a 'great many of the common sort' of prisoners agreed to transportation, the gentlemen refused to sign indentures, whereby they would undertake 'seven years service in the Plantations for Sir Thomas or his assigns as the said Sir Thomas should please to dispose of us.'<sup>24</sup> The gentlemen's argument was that they had only requested 'simple' transportation, that is, banishment from England or Scotland, without the necessity for labour. Johnson's indentures, as agreed with the Treasury, had pre-empted the gentlemen's position and moved transportation into a different status. A stand-off ensued and only when the rebels were faced with coercion and limited to a bread and water diet did they consent to sign the indentures, many without having been tried by a court. Between March and July 1716 some 639 rebels were deported from Liverpool in nine vessels and delivered to ports in Maryland, South Carolina, and Virginia in America and Antigua, Barbados, Jamaica and St. Christopher in the West Indies.<sup>25</sup> The logistical exercise involved compares in scale with the First Fleet expedition to Botany Bay in 1787 in which 750 convicts were transported in six vessels.<sup>26</sup>

Despite the compulsion, some of the transportations did not go to plan. On 3 August 1716 thirty rebels on the ship *Hockinghull*, bound for the West Indies,

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<sup>24</sup> The letter by an unknown writer, is quoted in, Wardle, "Sir Thomas Johnson and the Jacobite Rebels", at pp. 127-8. Wardle includes other letters to similar effect.

<sup>25</sup> "Treasury Warrants: March 1717, 16-25", in *Calendar of Treasury Books, Volume 31, 1717*, ed. William A Shaw and F H Slingsby (London, 1960), pp. 192-210 <http://www.british-history.ac.uk/cal-treasury-books/vol31/pp192-210> [accessed 25 December 2015].

<sup>26</sup> Charles Bateson, *The Convict Ships 1789-1868* (Glasgow, 1969), p. 100.

mutinied and took the ship to France. One of the rebels, L. Charteris, wrote to the earl of Mar (then in exile with James Stuart in France) about their circumstances and the mutiny. Charteris pointed out that the rebel prisoners had been indicted (by a grand jury) but had not been tried but were ordered for transportation anyway. This, according to Charteris, was in contravention of the Habeas Corpus Act.<sup>27</sup> These claims notwithstanding, coercion was again used to make the rebels sign indentures in order, according to Charteris, that they ‘consent to be slaves’.

In another incident, in August 1716 a number of rebels who had requested transportation to America escaped in Ireland and were at large in Cork and Waterford. This incident was to be mentioned in the legislative response. The escapees were eventually apprehended and continued to America to serve out the term of seven years under indenture to Johnson. Of the 639 rebels transported only two—John Porteous and John Dalzell—were not required to serve indentures. Both men had been nominated by Lord Carteret, one of the Lords Proprietors of Carolina, to be assigned to him. Reflecting the vagaries associated with the process of transportation, especially the transportation of men and women with respectable contacts, Carteret thereupon gave both men their liberty, although they still had to proceed to Carolina.<sup>28</sup>

Yet the transportation of the Jacobite rebels was not solely an issue of logistics: it undermined the prevailing processes associated with the transportation of offenders from Britain. To force an offender housed in a crowded London gaol to sign an indenture as a pre-requisite to his or her transportation must have appeared to be fraught with danger to the authorities at a time when the government was

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<sup>27</sup> Wardle, "Sir Thomas Johnson and the Jacobite Rebels", pp. 131-3.

<sup>28</sup> *Calendar of State Papers, Colonial, America and West Indies* (1716-17), p. 127

attempting to minimise public anxiety. At the same time, the argument that transportation without consent was contrary to the provisions of the Habeas Corpus Act 1679 must have had some level of popular appeal, as demonstrated by the prisoners at Preston. Preparing the processes in England for the transformation of an offender in England into a servant in America required a new solution.

A few months after Sir Thomas Johnson had delivered the last of his offenders to Jamaica in July 1716 a new issue arose in London, more particularly at Newgate Gaol. The gaol was overcrowded and the pressure needed to be relieved.<sup>29</sup> By a series of processes (which are not explained in the literature) the London based merchant Francis March contracted with the Lords of the Treasury on 7 December 1716 to transport from Gravesend:

all such malefactors (being in health) as his Majesty shall direct to be transported and [as] will agree or consent to serve the said March or his assigns in some of his Majesty's Plantations in America for eight years<sup>30</sup>

Transportation from England had hitherto been at the cost of the sentencing jurisdiction. In 1716, the Lords of the Treasury agreed to pay March 40s. for each 'malefactor' certified as having arrived in America. Three months later March submitted his account to the Treasury showing that he had shipped fifty-four malefactors from Gravesend to Jamaica in three vessels.<sup>31</sup> In April 1717 the

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<sup>29</sup> The state of the gaols in London at the time is canvassed by Anthony Babington. *The English Bastille: A History of Newgate Gaol and Prison Conditions in Britain 1188-1902* (London, 1971). See pp. 63-76 for conditions in the early 1700s.

<sup>30</sup> 'Treasury Warrants: December 1716, 1-15', in *Calendar of Treasury Books*, Volume 30, 1716, ed. William A Shaw and F H Slingsby (London, 1958), pp. 572-590 <http://www.british-history.ac.uk/cal-treasury-books/vol30/pp572-590> [accessed 29 December 2015].

<sup>31</sup> 'Treasury Warrants: March 1717, 6-10', in *Calendar of Treasury Books*, Volume 31, 1717, ed. William A Shaw and F H Slingsby (London, 1960), pp. 170-183 <http://www.british-history.ac.uk/cal-treasury-books/vol31/pp170-183> [accessed 27 December 2015], pp. 171-2. The fifty-four comprised twenty-five men and twenty-nine women. Lord Carteret was later appointed Lord Lieutenant of Ireland and reappears as a participant in transportation from Ireland later in Chapter 5.

keeper of Newgate Gaol made a further, and supplementary, claim on the Treasury for his costs in the matter by delivering and victualling the malefactors for transportation.<sup>32</sup> The keeper's account made it clear that he had facilitated what appear to be conditional pardons for the malefactors who, presumably, were all condemned felons. The fact that the fifty-four all came from Newgate suggests the problem of the overcrowded gaol had led directly to the act of their being transported. The terms of March's contract suggested that the consent of the malefactors was a necessary prerequisite to being sent to Jamaica. That is, the process of applying for a pardon upon condition of transportation relied upon the element of consent on the part of the offender. Thus, as in the case of the Jacobite rebels, transportation still had problems in implementation in that the consent of the offender was a necessary prerequisite to their deportation.

The terms of Sir Thomas Johnson's contract and those of Francis March are similar in wording and intention. Both were to be paid for proper performance, measured against appropriate certificates issued out of the place of disembarkation and secured by the provision of adequate sureties. Johnson's contract, dated 16 April 1716, invoked the language of the 1713 statute of Anne with respect to the treatment of vagrants, and contemporary practice in Virginia as well:

and the said Sir Thomas Johnson shall and will for and during the space of seven years after the arrival of the said rebels or prisoners in the said Plantations find and provide for all and every of them sufficient meat, drink, washing and lodgings in the said Plantations and all other necessities according to the custom of those countries provided the said rebels do and shall serve the said Sir Thomas Johnson and his assigns during that time as servants or apprentices ought to do in that country.<sup>33</sup>

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<sup>32</sup> *Ibid.* pp. 235-251.

<sup>33</sup> *Ibid.* pp. 183-191.

Eleven months later, on 6 March 1716, the contract with Francis March addressed the matter with less detail, merely stating that March would transport such malefactors ‘as would agree or consent to serve the said Francis March or his assigns in some part of his Majesty’s Plantations in America for eight years’.<sup>34</sup> Later contracts used in the transportation of offenders from England to America tended to follow the approach used by HM Treasury in the Francis March contract, even continuing to invoke the description of ‘malefactors’, but making no specific mention of the status of transported offenders as servants according to the custom of the country.<sup>35</sup>

So, to respond to the question: how did the statute 4 Geo I c. 11, and the inclusions of the formula ‘a property and interest in the service of the offender’ meet the circumstances of the time? It is clear that, in order to meet the fall out of the Jacobite rebellion and the problems faced by Sir Thomas Johnson in 1716, exacerbated by overcrowding in Newgate around the same time, the British government devised a process designed to do away with formalities in England and leave the subsequent status of transported offenders to be determined according to the laws of colonial America. In some cases as well, the government, through HM Treasury, were prepared to meet some of the costs.

It is now necessary return to the provisions of the act itself to examine its inner workings in order to understand how the concept of a ‘property and interest in the services of the offender’ came about and to consider the second supplementary

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<sup>34</sup> *Ibid.* pp. 170-183. The American historian AE Smith suggested that March’s contract was ‘an important precedent for the rest of the century. The analysis here would support that opinion. Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (New York, 1971), p. 112.

<sup>35</sup> See, for example, the contracts with John Stewart for the transportation of offenders from London and the Home Counties of 7 April 1763. Treasury Entry Books, T 54/39, pp. 228-9 and 229-30, The National Archives (hereinafter TNA).

question: how was the legislation of 1717 constructed and how did it evolve subsequently? While a number of authors have praised the passage of 4 Geo I c. 11, very few have examined its contents in detail.<sup>36</sup> The following analysis attempts to fill the void.

Consistent with contemporary practice, the act 4 Geo I c. 11 addressed a number of issues, not all of them related; the inclusion of measures on piracy is a case in point.<sup>37</sup> The substantive parts of 4 Geo I c. 11 addressed one general and two immediate problems, which were noted in the composite recital. The remedies were two-fold, addressing two different types of offences. The first was of general application and was possibly intended to extend beyond just crimes against property. The legislation provided that any person already convicted of felony within clergy before 21 January 1717 and who was ‘liable to be whipt or burnt on the Hand, or have been ordered to any Workhouse’ (i.e. those awaiting the application of punishment awarded within clergy) were to be liable to be transported to America for seven years. The legislation appeared to apply the punishment, though not create the offence, retrospectively to 21 January 1717, whereas the remaining provisions of the legislation took effect from the time of

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<sup>36</sup> JM Beattie’s 2001 analysis is the most comprehensive. Beattie, *Policing and Punishment in London, 1660-1750*, Chapter 9, ‘William Thomson and Transportation’, pp. 424-462. Beattie’s analysis is more concerned with Thomson’s influence on the administration of justice in London than with the provisions of the legislation.

<sup>37</sup> It is useful to note, however, that, chronologically, the most enduring provision of the omnibus statute was the material regarding piracy. In the modern chronology of British statutes 4 Geo I c. 11 is referred to as the Piracy Act. Also, Section VII authorised the transportation to America of persons already in ‘Prison’ charged with the unlawful exportation of wool but who stood mute against the criminal charges. In effect, the statute provided a benign alternative to *peine forte et dure*.



royal assent on 21 March 1717. It is clear that the actual application of this penalty to offenders was left to the discretion of the courts.<sup>38</sup>

The second remedy related back to the recital and concerns with respect to crimes against property. Here the act created new felonies involving:

Grand or Petit Larceny, or any felonious Stealing or Taking of Money or Goods or Chattels, either from the Person, or the House of any other, or in any other Manner, and who by the law shall be entitled to the Benefit of Clergy<sup>39</sup>

The punishment for these new offences, at the discretion of the court, was that the offender ‘be sent as soon as conveniently may be, to some of his Majesty’s Colonies and Plantations in America for the space of seven Years.’<sup>40</sup>

The parliament was, in effect, copying the punishment from the two statutes of 1670 examined in Chapter 2, both by making the application of the punishment discretionary at the option of the trial judge, and by designating transportation to America as the punishment. By attaching the punishment to general crimes against property, the use of transportation as a punishment was given wide application.<sup>41</sup> And by applying the punishment to those crimes which fell within clergy, the use of capital punishment was ameliorated and a punishment of non-capital felony was developed. This was to have repercussions when the concept of felony attain was considered against transported convicts.

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<sup>38</sup> There is no specific reference in court records to this penalty being applied. Neither JM Beattie in *Policing and Punishment in London*, Chapter 9, pp. 424-62, nor Roger Ekirch in *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford, 1987) mentions this aspect of the act.

<sup>39</sup> Section I.

<sup>40</sup> *Ibid.* Italics in the original.

<sup>41</sup> The two 1670 statutes were 22 Car II c. 5 and 22 & 23 Car II c. 7 discussed earlier. These related to the somewhat narrowly defined crimes of stealing cloth or his Majesty’s ammunition or stores (22 Car II, c. 5) and maliciously burning houses, stacks of corn, or killing or maiming cattle (23 & 23 Car II, c. 7).

The second issue addressed in 4 Geo I c. 11 was the problem of offenders who undertook self-transportation as an element of conditional pardon failing to fulfil their undertakings. The recital to the statute specifically identified the problem as having involved self-transportation to the West Indies, and was a clear reference back to the difficulties faced by Sir Thomas Johnson a year earlier with mutiny and escape to France of the rebels on the *Hockinghull*. The remedy was not a statutory device in itself. Rather it attached consequences in the circumstances whereby a person already condemned to death as a felon, successfully sought a pardon from the Crown conditional upon being transported, failed to meet their undertaking. Yet, despite the second recital, and the difficulties faced with the transportation of the Jacobite rebels in 1716, 4 Geo I c. 11 remained silent on the status of those offenders who undertook their own transportation, whether to the West Indies or to America. This omission was to remain unaddressed in all subsequent transportation legislation.<sup>42</sup>

The third issue identified in the recital to 4 Geo I c. 11 involved what was described as ‘the want of Servants in his Majesty’s American Colonies and Plantations.’ The remedy proposed for this problem was contained in section V, which included a subsidiary recital to the effect that:

Many idle Persons who are under the Age of one and twenty years, lurking about in divers Parts of London, and elsewhere, who want Employment and may be tempted to become Thieves if not provided for.

A scheme was established whereby London merchants would recruit ‘Persons’ between the ages of fifteen and twenty-one to ‘enter into Service’ in the American

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<sup>42</sup> Self-transportation was used in the opinion of the law officers of the crown in 1817 to differentiate the circumstances of convicts sentenced by Scottish courts. This is considered in Chapter 6.

colonies for terms not to exceed eight years. The intention was at the same time both preventative (avoid a life of crime) and charitable (provide an opportunity for the future). Yet the process contrasted sharply with that invoked in earlier sections of the statute for the treatment of felons both within and outside clergy. 'Idle Persons' taken into the scheme would be sent to America at the expense of the county. The process added credibility because both coercion and lack of capacity *sui juris* might have opened the scheme to questioning (reminiscent of the attempts of the Corporation of London during the years 1619 and 1621 mentioned in Chapter 1). Once an indenture was signed, the youths could be 'transported' to America, but it is clear that the word has no punitive element.<sup>43</sup>

The reference in the recital to 'the want of Servants' was identified by AGL Shaw as the primary justification of the statute 4 Geo I c. 11 and the development of the concept of 'property and interest in the service of the offender.'<sup>44</sup> But, from a proper reading of the relevant parts of the recital and the statute together, this view would seem to be incorrect. The act 4 Geo I c. 11 contained two entirely different approaches to the despatch of servants to America. One was involuntary, framed by the recitals regarding crimes against property and non-fulfilment of undertakings to proceed to transportation pursuant to a conditional pardon. This, involuntary, form of transportation gave rise to a 'property and interest in the service of the [transported] offender'. The other approach to the despatch of

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<sup>43</sup> The resulting contracts and consent forms formed the basis of David Galenson's PhD thesis. See David W Galenson, "British Servants and the Colonial Indenture System in the Eighteenth Century", *The Journal of Southern History*, 44, (1978), pp. 41-66. Galenson describes these materials and his use of them at pp. 42-3.

<sup>44</sup> Shaw, *Convicts and the Colonies*, p. 25. Shaw was not alone; Francis Forbes in 1837 and HB Simpson in 1899 held similar views. Forbes evidence to the House of Commons select Committee on 18 April 1837: *Report of the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*, 1837, No. 518, para. 259, p. 17; HB Simpson, "Penal Servitude: Its Past and Its Future" *The Law Quarterly Review*, 15 (1899), pp. 33-50, at p. 41.

servants to America was framed in the ‘want of servants’ wording of the third recital and gave rise to the scheme in section V. Importantly, and by way of differentiation between the two approaches, ‘transportation’ in accordance with section V did not give rise to any proprietary interest in the shipping contractor in Britain (although it may well have done in America once the ‘apprentice’ arrived there, but in accordance with the terms of the indentures and colonial common law, not by virtue of a British statute).<sup>45</sup>

Building on measures adopted in earlier practices, but never mentioned in the legislation of the seventeenth century, 4 Geo I c. 11 gave greater certainty to the procedures by which offenders who were to be transported were to be physically removed from the local gaol to America and the rights which accrued to the contractor who undertook this task. In order to enable transportation to occur at all the act vested a conveyancing power onto the trial court in respect of those offenders ordered to transportation. The power of the court to order transportation for robbery came into effect immediately upon conviction and operated as part of the sentence. In these circumstances and in wording reminiscent to the orders issued earlier by quarter sessions against vagabonds, the trial court had:

the power to convey, transfer, and make over such Offenders, by Order of the Court, to the Use of any Person or Persons who shall contract for the performance of such Transportation, to him or them, and his and their Assigns, for such Term of seven Years’<sup>46</sup>

The use of the description ‘to the Use of any Person’ is considered below.

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<sup>45</sup> Craies and Holdsworth took a somewhat cynical view of this process, Holdsworth, relying on Craies, described the process as creating ‘shadowy consent’. WF Craies, ‘The Compulsion of subjects to leave the Realm’, *Law Quarterly Review*, 6 (1890), p. 397. W. Holdsworth *A History of English Law, Volume XI* (London, 1938, reprint 1978), pp. 573, n. 1.

<sup>46</sup> The reference ‘to the Use of any person’ had no immediate implications. In this legislation the formula ‘a property and interest in the service of the offender’ appeared to be essential to establishing a relationship between the transported offender and the contractor. As will be seen later, the Irish legislation was to rely entirely on the ‘to the Use of’ formula after 1719 which was superseded by an entirely different process after 1725.

With regard to those offenders who benefitted from a conditional pardon, when the pardon had been received and pleaded in the trial court at a later date (for example, as part of the commission of Gaol Delivery at the conclusion of a subsequent session of the assizes), a comparable provision gave the trial court the power:

to order and direct the like Transfer and Conveyance to any Person or Persons, (who will contract for the Performance of such Transportation) and to his or their Assigns, of any such beforementioned Offenders ... for the Term of fourteen Years, in case such Condition of Transportation be general, or else for such other Term or Terms as shall be made Part of such Condition, if any particular Time be specified by his Majesty, his Heirs and Successors, as aforesaid

Thus far, the provisions of the statute had referred to the status of the penalty with respect to the offender. However, section I of the act ended with a general provision with respect to the contractor who undertook the task of transportation:

and such Person or Persons so contracting, as aforesaid, his or their Assigns, by virtue of such Order of Transfer, as aforesaid, shall have a Property and interest in the Service of such Offenders for such Term of Years.

In effect, the role and protection of the contractor now intruded into the criminal justice system to frame the nature of the punishment and affect the subsequent status of the transported offender. Public policy with respect to punishment was being implemented by private contractors for, as will be seen below, private profit.

It is unclear from the bifurcated nature of the manner in which the penalty imposed upon offenders within clergy who were to be made over ‘to the Use’ of the contractor, and the manner in which the penalty was imposed upon offenders

who were to be conditionally pardoned and transported, i.e. that the contractor would have a 'Property and interest in the Service of the offender' amounted to the same thing. In a later statute of 1766, (6 Geo III c. 32) the idea of 'use' and a 'property and interest in the service of the offender' were combined, but only with respect to those offenders who were within clergy. The act 4 Geo I c. 11 did not apply the formula 'to the Use of the contractor', to offenders transported pursuant to a conditional pardon and neither did later transportation legislation.<sup>47</sup> By the end of the eighteenth century, the regular practice within the assize courts was to record sentences of transportation in standard forms. Two examples suffice: on 24 July 1784, Elizabeth Bason was convicted of felony outside clergy at the assize at New Sarum in Wiltshire, but was offered a conditional pardon and sentenced to transportation for seven years. Two justices from the county of Wiltshire were authorised to enter into a contract with 'any Person or Persons for the Performance of the Transportation' of Elizabeth Bason and the court ordered that she 'be transferred to the Use' of the contractor. Nothing was said about the contractor acquiring property in Elizabeth Bason's services.<sup>48</sup> On 17 July 1790, the same court at New Sarum sentenced two men, John Bigwood and James Butt, to life and seven years respectively in New South Wales against the same formula.<sup>49</sup> The implications, from both the 1784 and 1790 court forms are that record was made of the defendant being passed to the 'use' of the transportation contractor, it was not considered necessary to record the resulting property in the service of the offender acquired by that contractor since that would arise by

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<sup>47</sup> As will be seen later, the Irish transportation legislation was based entirely upon this formula.

<sup>48</sup> Western Circuit Assizes, Transportation Order Book 1771-1789, ASSI 24/26 unnumbered folio dated 24 July 1784, TNA.

<sup>49</sup> file ASSI 24/27 unnumbered folio dated 17 July 1790, TNA.

operation of law, and not from the sentencing. This view re-emerged in 1817 as discussed in Chapter 6.

It becomes clear from the wording of the contractor's newly acquired statutory right that some aspects of that right accrued in England once the procedures of transportation had commenced. However, what is not clear is whether a 'property or interest in the service' of another person was a feature of contemporary law in England before 1717 or whether 4 Geo I c. 11 was attempting to create something new. In 1710, the parliament had enacted the so called 'Statute of Anne', the first legislation creating what is now referred to as copyright.<sup>50</sup> Just seven years prior to 4 Geo I c. 11, the Statute of Anne did not utilise the concept of property in intangible things, instead preferring to state the rights of the author as being the 'sole right and liberty' in printing written work. English common law offers little evidence of any origin for the idea of property in the service of transported offenders. As mentioned earlier, HB Simpson thought that the 'slave' legislation, 1 Edw VI c. 3 provided a statutory basis for the concept of property in the service of people. Simpson related the provisions of 1 Edw VI c. 3 to the punishment of vagabonds and the offender's labour being put to the public good.<sup>51</sup> He drew the same argument with respect to the labour of convicts in America and Australia, but he was overstretching the comparison. While part of 1 Edw VI c. 3 permitted the use of a slave's labour by corporations, the default provision in Section IV enabled a master to enslave his recalcitrant servant for the benefit of the master, not for the benefit of the public.

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<sup>50</sup> See 8 Anne c. 19 which received royal assent on 10 April 1710.

<sup>51</sup> Simpson, "Penal Servitude: Its Past and Its Future", pp. 37-8.

As indicated in Chapter 1, in Sir Thomas Smith's characterisation of the laws of England at the end of the sixteenth century, a master had jurisdiction over the members of his household, which included his servants. It was also possible, by means of the concept of status, for laws to apply to servants and the relationship between a master and his servant by virtue of that relationship, which extended beyond any contractual arrangements. But did status exist in England in 1717 in such a way that would have allowed the argument that a master in England had a property and interest in the services of his servant? The answer to this question rests on somewhat differing opinions from eighteenth, nineteenth, and even twentieth century legal authorities and might, in the final analysis, rest on semantics and etymology.

The principal authority, and possible cause of the difficulty, is Sir William Blackstone.<sup>52</sup> In Book 1 of his *Commentaries*, Blackstone summarised the law of master and servant.<sup>53</sup> At no stage did he make any general statement to the effect that a master held property in the services of his servant. However, when considering how the relationship of master and servant may have impacted upon a third party, Blackstone asserted:

The reason and foundation upon which all this doctrine [that is an action at law against a third party who may have interfered with the relationship] is built, seem to be the property which every man has in his domestics; acquired by the contract of hiring, and purchased by giving them wages.<sup>54</sup>

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<sup>52</sup> For criticism of Blackstone's work on the subject of master and servant see Sir Otto Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment" *Law Quarterly Review*, 93 (1977), pp. 508-528, at pp. 510-12.

<sup>53</sup> William Blackstone, *Commentaries on the Laws of England* (London, 1765), Volume I, Chapter 14, pp. 410-20.

<sup>54</sup> Blackstone, *Commentaries on the Laws of England*, Volume 1, p. 417.



In most of his other commentaries, Blackstone was keen to cite legislative or case law as authority for his claims: none was offered for this assertion. Despite an apparent lack of authority, Blackstone's views had qualified support. Writing in 1883 the Scottish born English jurist Sir John Macdonell, in addition to confirming that the relationship of master and servant arose out of contract, added that 'the relation is, in some respects, status.' A master's rights 'are somewhat of the nature of property.'<sup>55</sup> The American historian and sociologist Robert Steinfeld, writing in 1991, was equally equivocal. Having traced the English medieval concepts of villeinage and wardship, and examined the hiring out of servants by a master, Steinfeld noted that:

The treatment of labor services as a form of property remained for the most part implicit rather than explicit in English law. No systematic development of property principles ever took place, perhaps because the English felt more comfortable portraying these relationships in jurisdictional terms.<sup>56</sup>

However, after a close examination of some English cases, Steinfeld concluded:

Accordingly we never find a systematic development of property principles in the English law of labor agreements. What the evidence does show, however, is that the English did consider the labor agreement a kind of lease and did rely on leasehold principles in defining certain of its core characteristics.<sup>57</sup>

Dismissing any property principles with respect to labour agreements, Steinfeld concluded by stating the capability of a master to hire out servants in terms of leasehold principles, which rest fundamentally upon the proprietary nature of the item being leased (hired).

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<sup>55</sup> Sir John Macdonell, *The Law of Master and Servant, Being a Treatise on the Law Relating to Contracts of Service, Apprenticeship, and Employment* (London, 1908), p. 193.

<sup>56</sup> Robert J Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill, 1991), p. 73.

<sup>57</sup> Steinfeld, *The Invention of Free Labor*, p. 78.

Contemporary commentators cast the ‘property’ right in a better perspective. The jurist JR Bird, restating much of Blackstone and quoting the same text from Blackstone’s Book 1, referred not to the master’s property, but rather to the master’s ‘interest’.<sup>58</sup> More useful is the work of another contemporary jurist Matthew Bacon, which covers much of the ground covered by Blackstone, but is more incisive on the point of law involved. When considering the remedies at law that a master may take against a third party who enticed a servant away from the master or caused the servant injury, thus depriving the master of the servant’s services, Bacon stated: ‘It is clearly agreed, that from the interest a master has in the labour and service of his servant, he may maintain an action for inciting of taking him away.’<sup>59</sup> Bacon made clear what Blackstone did not. The ‘property’ that Blackstone, Macdonell, and even Steinfeld, alluded to was no more than the legal capacity of a master, who had been deprived of the services of his servant through enticement or injury, to recover damages. The legal remedies available to the master addressed his loss of services, not loss of property. Bacon used ‘interest’ rather than ‘property’ making the true nature of the master’s capacity more evident. Bacon’s ‘interest’ and even Blackstone’s ‘property’ were proprietary only to the extent that the master was deprived of the services of a servant. They were not ‘property’ in the same way that the shipping contractor acquired an assignable proprietary right pursuant to 4 Geo I c. 11 which he could (or would) monetise in America.

From the above analysis of the master’s property and interest in the service of a servant two issues become evident: first, there was no concept in English law in

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<sup>58</sup> JR Bird, *The Laws Respecting Masters and Servants* (London, 1795), pp. 3-5

<sup>59</sup> Matthew Bacon, *A New Abridgement of the Law*, 5<sup>th</sup> edition ed. Henry Gwillim (London, 1798), p. 5

1717 by which a master owned a transferable proprietary interest in the services of his servant. Second, that the formula ‘a property and interest in the services of the offender’ when used in the act 4 Geo I c. 11 was breaking new ground and was intended to create a new legal right which had nothing to do, in the immediate term, at least in England, with the relationship of master and servant. Instead, the new formula created a transmissible interest for the commercial benefit of the shipping contractor once the transported offender reached the American colonies.<sup>60</sup> This mechanism is similar to the true nature of the Logward indenture of 1624 discussed in Chapter 1.

Returning now to the text of 4 Geo I c. 11, as already mentioned, the final form of the bill received royal assent on 21 March 1717. Some provisions, however, came into operation with respect to offenders already convicted of any offence within clergy and in gaol on 20 January 1717. This was, therefore, a partially retrospective operation. The exact implications of this provision are not clear because it might have suggested some form of double penalty by virtue of the retrospective nature of the operation of the legislation. It is clear, however, that the operation of this provision did not operate so as to allow incorrigible rogues or vagabonds, as such, to be transported since, in the normal course, they would not have been offending felons within clergy.<sup>61</sup>

Having set out the formulae for transportation for offenders both within and outside clergy, the act 4 Geo I c. 11 then set out three riders. The first was stated

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<sup>60</sup> B Kercher, "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850", *Law and History Review*, 21 (2003), pp. 527-584, at p. 531.

<sup>61</sup> Without access to the court records for the whole of England for the period, it is not clear whether, for instance, Gaol Deliveries after passage of the legislation was used to apply transportation to those already in gaol between 20 January and 21 March 1717. Nothing in the Old Bailey records for the period suggests such an application.

at the beginning of section II and provided that an offender ordered to transportation in accordance with the statute, but who returned to any part of Great Britain or Ireland before the expiry of the relevant term of seven or fourteen years, committed a new felony for which the punishment was death without benefit of clergy. A similar provision had been contained in all statutory measures invoking banishment or transportation as a punishment since 1593 and the laws against conventicles, as well as the statute 39 Eliz I c. 4 against rogues, vagabonds, and sturdy beggars. The seventeenth century English jurist Matthew Hale identified the felony of returning to Britain while an order of transportation was still current as a Plea of the Crown.<sup>62</sup>

The second rider in 4 Geo I c. 11 contemplated the circumstances of the King granting a pardon to an offender whilst serving a term of transportation. A proviso to section II allowed the King to ‘pardon and dispense with any such Transportation and allow the Return of any such Offender or Offenders from *America*’, but in such circumstances:

he or they [i.e. the transported offender] paying their Owner or Proprietor, at the Time of such Pardon, Dispensation, or Allowance, such Sum of Money as shall be adjudged reasonable by any two Justices of the peace residing within the Province where such Owner dwells

The use of the words ‘Owner or Proprietor’ appeared to extend beyond any concept of master and servant as understood in England in 1717 as analysed above and underscored the concept of servitude that had emerged as part of the

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<sup>62</sup> Matthew Hale, *Pleas of the Crown: Or a Methodical Summary of the Principal Matters Relating to That Subject*, (London, 1716), p. 124. Hale similarly included refusing to depart after swearing to abjure the realm. See p. 123.

common law of the American colonies in which a master acquired a proprietary interest in his servant's services.<sup>63</sup>

Section II of the act 4 Geo I c. 11 contained the third rider. The completion of a term of transportation was to operate as a form of pardon in the following terms:

where any such Offenders shall be transported, and shall have served their respective Terms, according to the order of any such Court, such Services shall have the Effect of a Pardon to all intents and Purposes, as for that Crime or Crimes for which they so transported, and shall have served, as aforesaid.<sup>64</sup>

The intent of this rider is at once obvious but, on closer examination, is surrounded by difficulties. This was, in effect, a parliamentary pardon but it would appear to have been unnecessary. An order of seven years transportation would have been rendered complete or discharged by effluxion of time at the end of the period, while those serving fourteen years (or longer) pursuant to a conditional pardon would, in effect, have been pardoned by virtue of the terms of the pardon itself. A similar provision was considered in legislation in 1767 which is considered below. The rider, nevertheless, appeared to have the intention to alter the status of the transported offender back to his or her *status quo ante*. This may have been included to provide the appearance, at least in England, that the language of 'property' did not amount to slavery.

The remaining provisions of the act 4 Geo I c. 11 covered administrative matters.

Section III addressed some of the legal processes associated with physically transporting offenders from an English county or local gaol to America.

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<sup>63</sup> This formula enabling a compensatory monetary amount to be a condition precedent to the pardon of a transported offender by the crown was to trouble Francis Forbes, the chief justice of New South Wales, at the end of the 1820s. See Chapter 8.

<sup>64</sup> Query the application to those pardoned – presumably the pardon would have addressed this issue.

Legislation prior to 1717 invoking transportation as a punishment had been silent on these arrangements, leaving the mechanisms to the sentencing court, and its officers, to implement. Earlier clauses of 4 Geo I c. 11 had authorised the sentencing court to transfer offenders into the control of the contractor, or his assigns. Before this could happen, however, the contractor was to provide security to the satisfaction of the court that the activity of transportation would be completed 'effectually'. In order to recover the security the contractor was required 'as soon as conveniently may be' to lodge with the court certificates from the colonial governor or customs-officer at the designated place in America to which the offenders had been sent.' Death and Casualties of the Sea' were 'excepted'.<sup>65</sup> The issue of the contractor's security remained a feature of the transportation to New South Wales.<sup>66</sup>

Section III concluded by placing an obligation on the contractor to prevent, by means of wilful default, the return of an offender to any part of Great Britain or Ireland. The clause did not indicate whether this obligation was to operate only during the term of each offender's transportation or whether it was to operate so as to keep the transported offender perpetually in America. Presumably, the obligation was assigned as well, but there is no evidence of any enforcement. The latter view would seem unlikely, but appeared to remain unresolved for some time and was not resolved until the end of the century and in different circumstances. In 1795 Governor King of New South Wales sought advice from London as to whether he was to permit convicts whose terms had expired to return to England.

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<sup>65</sup> The implementation of this process in the American colonies is described in detail by Schmidt. See Frederick Hall Schmidt's PhD thesis, "British Convict Servant Labor in Colonial Virginia", (William & Mary College, 1976), pp. 73-82.

<sup>66</sup> The extent of these later operations is considered in Chapter 4.

The Duke of Portland (the then Secretary of State) reminded Governor Hunter that there was no continuing obligation to maintain transported offenders in the colony whose terms had been served.<sup>67</sup> As mentioned earlier, 4 Geo I c. 11 remained silent on the circumstances of self-transports.

Sections VIII and IX of 4 Geo I c. 11 addressed the territorial extent of the statute; issues raised in the debates in the House of Lords. By operation of section VIII, the statute was not to apply in Scotland. Section IX extended the statute to ‘all his Majesty’s Dominions in *America*’. This meant that the statutory right the contractor acquired to the ‘property and interest in the service of the offender’ was transmissible to an assignee in Virginia. In effect then, 4 Geo I c. 11 and its creation of the concept of ‘a property and interest in the service of an offender’ completed the transformation of a convicted felon in an English court into a colonial servant in America a state of servitude. There was to be no similar mechanisms in the 1784 and 1785 legislation which covered transportation to New South Wales.

The immediate aftermath of the bill becoming law on 21 March 1717 was played out four weeks later. At the Old Bailey session which commenced on 23 April 1718, the first sentences of transportation were handed down to twelve men and eighteen women. The session was chaired by Lord Mayor Lewen, and the recorder Sir William Thomson, both members of the committee on the bill during its passage through the House of Commons.<sup>68</sup> Changes in judicial sentencing were

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<sup>67</sup> Letters from the Secretary of State, CO 202/5 ff. 145-8, TNA. And see *Historical Records of Australia, Series 1* (hereinafter 1 *HRA*), volume 1, p. 582.

<sup>68</sup> *Old Bailey Proceedings Online* ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), version 7.0, 14 December 2012), April 1718 (17180423). The numbers of men and women ordered for transportation differ slightly in the detail and then the summary of the session’s proceedings.

almost immediately discernible and were far reaching. Using evidence from Surrey, Beattie demonstrated both a sharp fall in the use of clergy to mitigate excessive use of the death penalty and an immediate utilisation of transportation.<sup>69</sup>

The enactment of 4 Geo I c. 11 and the increase in the number of offenders being transported saw changes to the convict transportation industry. Prior to 1716 transportations were small in number and haphazard, with small contractors carrying a few offenders at a time.<sup>70</sup> With a significant increase in the numbers now being transported and, after 1719, with HM Treasury paying a subsidy for each offender landed in America, a lucrative trade began. Subsidies were limited to London and the Home Counties. Initially set at £3 per head landed in 1719, the subsidy was increased incrementally until in 1727 it reached £5 per head and remained at that level until 1772 when it was discontinued, the industry being sufficiently lucrative to no longer require government support.<sup>71</sup> The shipping contractors were generally cross-Atlantic merchants with some, for example Jonathan Forward, also being engaged in the transportation of slaves to America. Many of the contractors also carried indentured labourers to America.<sup>72</sup> And while small contractors continued to ship small numbers of offenders to America, there

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<sup>69</sup> Beattie, *Crime and the Courts in England 1660-1800*, p. 507-9. In Table 9.8 on p. 507, Beattie points out that between 1663 and 1715, only 15 men and 3 women were transported to America, while 193 men and 87 women were granted clergy. Whereas in the years between 1722 and 1749 the corresponding figures were; 198 men and 60 women transported, while 29 men and 18 women were able to claim clergy.

<sup>70</sup> Ekirch, *Bound for America*, p. 70. PW Coldham provides a useful catalogue of the pre-1717 practice of assize and quarter sessions courts contracting for transportation. See PW Coldham, *Emigrants in Chains: a social history of forced emigration to the Americas, 1607-1776* (Baltimore, 1992), Appendix VI, pp. 179-80.

<sup>71</sup> Ekirch, *Bound for America*, p. 71. Ekirch estimates that during the currency of the subsidy scheme, some £86,000 was paid to contractors for the transportation of around 18,000 men and women.

<sup>72</sup> Ekirch, *Bound for America*, p. 75.



was a tendency for a few larger contractors to dominate the market.<sup>73</sup> Jonathan Forward held a contract to ship offenders from London over a twenty year period. Andrew Reid succeeded Jonathan Forward and, through a series of business and family associations, was replaced by John Stewart.<sup>74</sup> In the 1750s Andrew Reid was joined by Duncan Campbell who held the contracts for London and the Home Counties in 1776. Duncan Campbell's role in transportation after 1776 is considered later.

The profitability of the transportation industry rested on the transportation contractor's capability to sell the services of the offenders he had transported to America. In 1716 the Treasury contract with Sir Thomas Johnson has set out with some particularity that, 'provided the said rebels do and shall serve the said Sir Thomas Johnson and his assigns during that time as servants or apprentices ought to do in that country'.<sup>75</sup> The Treasury contract with Francis March less than a year later referred to malefactors 'as would agree or consent to serve the said Francis March or his assigns in some parts of his Majesty's Plantations in America for eight years'. These provisions were not stated in subsequent contracts. On 7 April 1763 John Stewart signed two contracts with the Lords Commissions of the Treasury, one for the transportation of offenders from London and one from the Home Counties. Stewart undertook to collect offenders under orders of transportation 'without excepting or refusing any by reason of age, lameness, or

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<sup>73</sup> Ekirch, *Bound for America*, pp. 74-5. Ekirch points out that while offenders were transported from ports around England, the tendency was for Bristol to become the point of embarkation for offenders being transported from the west of England and London being the point of embarkation for those from the east of England.

<sup>74</sup> John Stewart's contract of 6 April 1770 for convicts from London is set out in Treasury file T 54/41, pp. 106-7, TNA. The contract for the Home Counties is set out in T 54/41, pp. 111-2.

<sup>75</sup> 'Treasury Warrants: March 1717, 11-15', in *Calendar of Treasury Books, Volume 31, 1717*, ed. William A Shaw and F H Slingsby (London, 1960), pp. 183-192: <http://www.british-history.ac.uk/cal-treasury-books/vol31/pp183-192> [accessed 27 December 2015].

any other infirmities whatsoever within fourteen days after the end of every 2<sup>nd</sup> session'.<sup>76</sup> In return Stewart would be paid £5 for each offender taken from the gaols, delivered with an appropriate colonial certificate of landing, and ensuring their non-return to England through his wilful default. Yet nowhere is Stewart's right to enjoy the property in the service of the offender stated in the contracts. Clearly, the provisions of 4 Geo I c. 11, made any reference to Stewart's statutory rights redundant. Stewart could sell the offenders in the colonial labour market and pocket the proceeds of the sale by virtue of the legislation, not his contract with the Treasury.

Despite the apparent attention to detail, two matters were not covered by the 1717 statute. First, the administrative mechanisms necessary to move offenders from parts of England, other than London, to a sea-port for transportation were absent. Second, the status of a transported offender while they remained in England was uncertain; were they servants of the contractor or were they merely in his custody? Whether these omissions occurred because the bill was developed in the immediate aftermath of the trial use of a government sponsored shipment of offenders from London by Francis March during 1717 is not entirely clear. This would explain why the statute was drafted with regard only to the rights and benefits of the transportation contractors in mind, but made no mention, for example, of the benefits and protections that accrued to transported offenders under the transportation arrangements covering vagrants under the 1713 statute 13 Anne c. 26. The 1717 statute made no attempt either to state whether it was compatible, or in conflict, with those provisions of the Habeas Corpus Act 1679.

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<sup>76</sup> Treasury Entry Books, 1762-1765, T 54/39 pp. 228-9 and 229-30, TNA.

Sir Thomas Johnson's experience in the aftermath of Preston was localised to Lancaster and the Jacobite rebels were embarked from Liverpool avoiding, or at least minimising, cross-county border issues. The 1717 statute and its immediate grant of rights to the contractor (provided appropriate security was in place) ignored any wider consideration of the powers of the contractor. How would he move offenders from, say, a provincial town to the nearest seaport? In the normal course, this would have involved crossing different county jurisdictions and would have cast the status of the custodial powers of the contractor into question. Yet, the contractor, as a result of the 1717 statute, did not have the powers of a sheriff. This omission, though not the question of the rights of the transported offender, nor compatibility with Habeas Corpus, was one of the problems giving rise to additional legislative measures in 1719, which complemented the processes of 1717 and the subsequent evolution of the legislation.

George I's fourth parliament sat from 11 November 1719 until 18 April 1720. On 15 February 1719 Sir William Thomson was given leave to introduce a bill for *An Act for the further preventing Robbery, Burglary, and other Felonies; and for the more effectual Transportation of Felons*.<sup>77</sup> On 8 April 1720 the bill was led through the committee's report by Viscount Chetwynd; Sir William Thomson having been dismissed as solicitor-general on 17 March 1719.<sup>78</sup> Between 12 April

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<sup>77</sup> See *JHC*, Volume 19 (1714-1718). For deliberations on 20 February 1719: p. 273. For 26 February: p. 283. For 12 March, 17 March, 23 March, 26 March 1720, 2 April, 7 April, 8 April and 9 April 1720 See respectively pp. 283, 289, 301, 304, 317, 321, 328, 333, 335-6, and 336. The third reading is noted at p. 337.

<sup>78</sup> Thomson had brought corruption allegations against attorney general Sir Nicholas Lechmere. The charges were heard, in part, by a committee of the Commons and found to be without foundation. Thomson was thereupon dismissed, although he remained a member of the Commons and recorder of London. Attorney General Lechmere continued in office for only a few weeks, being dismissed on 7 May 1720 for speculation in the shares of the South Sea Company. These issues are examined again below with respect to their possible impact upon the framing of the Irish transportation legislation of 1719.

and 1 June 1720 the bill was debated in the Lords, who requested the attendance of some of the judges at Westminster to assist their deliberations suggesting attention to detail and propriety. The Lords amended the original legislation of 1717 by empowering the courts to enter into contracts for the transportation of offenders, proscribing punishments for aiding and abetting the escape of offenders from transportation and introducing the crime of ‘being at large’ whilst under sentence of transportation. The amended bill received royal assent on 11 June 1720 as the act 6 Geo I c. 23.<sup>79</sup>

The act of 1719 now established processes whereby the transportation of offenders from any court in England could be administered. These processes were built upon the local jurisdiction of the county courts, which were made responsible for the entire costs.<sup>80</sup> Each court would enter into an appropriate transportation contract and administer the receipt of security for the satisfactory transportation of each offender. The inclusion of the procedure for contracting within the legislation seems to have been at odds with the actual practice. Francis March’s contract was with the Lords of the Treasury. After 1719, and with the active support of Sir William Thomson in his capacity as recorder of London, a further contract was awarded to Jonathan Forward giving rise to a contractual framework, which continued through until 1776.<sup>81</sup>

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<sup>79</sup> The act takes its regnal year citation from the year in which the session commenced, not from the date of royal assent. The deliberations of the Lords are set out in *Journals of the House of Lords* (Hereinafter *JHL*), Volume 21, (1718-1721). See 12 April 1720 at p. 304; 27 April at p. 310; 5 May at p. 319; 16 May at p. 330; 25 May at p. 337; 27 May at p. 338; 21 May at pp. 341-2; 1 June at p. 343. Royal assent is at pp. 357-8.

<sup>80</sup> See Section III. The formula used in the act of 1719, which was to be repeated in subsequent transportation legislation, was ‘the said County, Riding, Division, Liberty or Place, where such Offenders were or shall be convicted’ which targeted Quarter or General Sessions but would have included assize courts as well.

<sup>81</sup> See *Calendar of Treasury Papers*, Volume CCXIV, item 50, 1714-1719, (London, 1883), p. 389.

While the scale of the transportation activity in 1719 was larger and the costs greater than the contract awarded to Francis March in 1717, the processes contemplated in the legislation were essentially an enlargement of the passing and conveying of rogues, vagabonds, and sturdy beggars from the late Tudor period mentioned in Chapter 2. But, in one measure, the 1719 mechanism was different. The passing of vagabonds was carried out within each county jurisdiction and exchanges were made at county (or jurisdictional) boundaries. The process of transporting an offender to America now in contemplation in 1719 involved the transfer of the offender out of the custodial jurisdiction of the county sheriff into the hand of the assignee of the shipping contractor who, in moving the offender, acquired a property in the service of that offender. However, the words of the act were ambiguous as to the rights acquired by the contractor. An offender was to be delivered ‘out of the custody of the gaoler’, but the contractor was given the power to:

in such Manner as they shall think fit, carry and secure the said Felons and Offenders in and through any County and Counties of Great Britain whatsoever, toward the Sea-Port from whence they are to be transported<sup>82</sup>

Whether the power ‘to carry and secure’ amounted to custody or mere control is not clear. From the terms of the court order, the contractor acquired different rights and obligations to a sheriff or a gaoler and those rights crossed county boundaries. The contractor did not become an extension of the gaoler or sheriff and his powers rested upon the definition of the statute. However, the combined operation of the contractor’s statutory powers and the introduction of the offence of ‘being at large’ meant that the distinction between the powers of the contractors

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<sup>82</sup> Section IV.

and those of the sheriff or gaolers became academic. Yet what emerged from these processes was the first small steps towards the evolution of a national, as opposed to a county, based system of criminal justice in England.

The scheme contained within the two acts of 1717 and 1719 proved to be reasonably stable. With only minor modifications and adjustments, the scheme was to remain in place until 1775 when transportation to America was disrupted. The modification legislation is summarised in Table 4.

**Table 4: Summary of British transportation legislation between 1717 and 1775**

	Year and regnal year citation	Mischief or target
1.	1717: 4 Geo I c. 11	More effectual Transportation of Felons
2.	1719: 6 Geo I c. 23	The same
3.	1742: 16 Geo II c. 15	The more easy and effectual Conviction of Offenders found at large
4.	1747: 20 Geo II c. 46	Prevention of return of such rebels and traitors
5.	1766: 6 Geo III c. 32	Extension of regime to Scotland
6.	1767: 8 Geo III c. 15	More speedy and effectual Transportation of Offenders

The principal drivers for changes to the British legislation between 1719 and 1776 fell into one of four areas; first, the continuing problem of self-transporters not proceeding to America; second, an expansion in the term for which transportation could be imposed; third, the extension of the statutory transportation scheme to Scotland; and, fourth, an acceleration of the process of transportation between condemnation at trial and the grant of a conditional pardon and an order of transportation. Additionally, and throughout the period following 1719 until 1767

the British parliament continued to extend the punishment of transportation to an increasing number of crimes.<sup>83</sup>

The issue of offenders under sentence of transportation failing to make the journey to America, one of the concerns that had given rise to the enactment of 4 Geo I c. 11 in 1717, was still an issue in 1742 and the penalty of felony without benefit of clergy was restated.<sup>84</sup> Following the 1745 rebellion, transportation was imposed upon Jacobite rebels following their defeat at Culloden. As thirty years earlier, some rebels ordered to transportation failed to meet their undertaking giving rise to a legislative response in 1747 invoking the same punishment of felony without benefit of clergy.<sup>85</sup> Aiding and abetting people avoiding transportation were to meet a similar punishment and rewards were offered to encourage successful apprehensions and prosecutions.<sup>86</sup> To facilitate an appreciation in the American colonies of who was a transported offender and who was not, the 1747 legislation went one step further, connecting the criminal justice system to the American colonies. Copying an Irish practice, lists of pardoned and transported offenders were to be sent with each shipment of transported offenders and published in the colony for public information.<sup>87</sup> The recital to the legislation indicated that the measure was intended to minimise the return of rebels who had been sent to America to return to Great Britain without licence; whether this was

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<sup>83</sup> See Wilfred Oldham, *Britain's Convicts to the Colonies*, (North Sydney, 1990), p. 12 and 12 Geo I c. 29 applied to attorneys carrying on practice after certain convictions; 7 Geo II c. 21 applied to assaults with intent to rob; 16 Geo II c. 31 applied to assisting offenders to escape; 18 Geo II c. 27 for stealing linen; 25 Geo II St. 2, c. 10 applied to entering mines with intent to steal; 10 Geo III c. 48 applied to receiving watches, plate, etc.; 12 Geo III c. 48 applied to altering velum documents; and 13 Geo III c. 39 for counterfeiting.

<sup>84</sup> 16 Geo II c. 15, section I.

<sup>85</sup> 20 Geo II c. 47, section I. See also Chapter 5 of Morgan and Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves*, pp. 81-9.

<sup>86</sup> 16 Geo II c. 15, section I and 20 Geo II c. 46, section I.

<sup>87</sup> 20 Geo II c. 46, section V. The Irish scheme is mentioned in Chapter 5.

effective is not clear. In any event the provision, while referring to the ‘late Rebellion’, was of general application.

The original framework of 4 Geo I c. 11 and 6 Geo I c. 23 had only contemplated transportation for seven years by way of sentence for offenders within clergy and fourteen years being the term imposed by way of a conditional pardon, although the latter did acknowledge that the terms of the conditional pardon could be other than fourteen years. In 1742 the punishment of transportation for life, by way of conditional pardon was also contemplated.<sup>88</sup>

In 1744, in a major policy shift in the management of the vagrancy laws, incorrigible rogues and vagabonds might, at the discretion of the court, be adjudged guilty as non-capital felons and sentenced to transportation for up to seven years.<sup>89</sup> In effect this measure ended the distinction between vagabonds as misdemeanants, which had been a direct result of the 1597 legislation of Elizabeth I on the one hand and non-capital felons from 4 Geo I c. 11 on the other. Whether the distinction had a direct impact upon the transportation of vagabonds, and in what capacity they were transported—misdemeanants or felons—is not clear. The Old Bailey records suggest a tendency to merge all forms of transportation whatever the legal basis for the expatriation. In 1743, the formula describing transported offenders shifted from ‘felons’ to ‘felons and other offenders’ suggesting that those undergoing transportation might, in future, be more than just

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<sup>88</sup> 16 Geo II c. 15, section I. As will be seen below, the concept of servitude for life – a logical consequence of the literal application of the legislation – was ameliorated in America by local practice which read down the term of servitude.

<sup>89</sup> 17 Geo II c. 5, section IX.



non-capital felons.<sup>90</sup> Some element of differentiation between felons and other offenders was still evident in the documentation of the Second Fleet convicts that were sent to New South Wales. This is considered in Chapter 4.

As already mentioned, the act 4 Geo I c. 11 had originally been excluded from operating in Scotland at the insistence of the House of Lords. By 1766 the application of one set of rules for England but with no apparent rules for Scotland caused George III's first parliament to recite that 'whereby the effectual Transportation of Offenders from that Part of the United Kingdom [Scotland] is often disappointed'. The exclusion of Scotland was not absolute. The 1747 legislation which had been concerned with rebels from the 1745 rebellion not proceeding to transportation made it clear that that act was to be enforced in Scotland by the High Court of Justiciary.<sup>91</sup> Now, with effect from 1 April 1767, the operative parts of 4 Geo I c. 11 were extended to Scotland.<sup>92</sup> However, the means by which this was accomplished was not as straightforward as some writers seem to believe.<sup>93</sup> The statute 4 Geo I c. 11 had established in England the non-capital crimes of grand or petit larceny, the felonious stealing or taking of money or good and chattels, either from the person or from the house on another.<sup>94</sup> These

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<sup>90</sup> George II's third parliament addressed a number of related issues surrounding the apprehension of escaped 'Prisoners', i.e. offenders guilty of treason and felony, other than petty larceny and persons not proceeding to transportation. See 16 Geo II c. 31 and 16 Geo II c. 15. The distinction in the definition of 'Prisoners' and 'felons and other offenders ordered to transportation' suggests a difference in both their status in England and the nature of their punishment: an offender ordered for transportation was not a 'prisoner'.

<sup>91</sup> See 20 Geo II c. 46, sections IV and V.

<sup>92</sup> 6 Geo III c. 32, section V.

<sup>93</sup> Shaw, *Convicts and the Colonies*, pp. 36-7. Shaw merely notes the extension of the English regime to Scotland. And see Roger Ekirch, "The Transportation of Scottish Criminals to America During the Eighteenth Century," *Journal of British Studies*, 24 (1985), at p. 368 *et seq.* Ekirch's article provides a useful description of Scottish transportation practices but he incorrectly concluded that the act 6 Geo III c. 32 was repealed in 1773 by the act 13 Geo III c. 54. The latter act only repealed those portions of the 1766 act which related to the practice of *Muirburn*, that is, the unlawful burning of wild heather to facilitate regeneration and game hunting.

<sup>94</sup> See 4 Geo I c. 11, section I.

provisions were not extended to Scotland as such in 1766. Instead, the punishment of transportation was extended to Scotland for those crimes in Scottish law which already authorised the punishment of banishment. The first intention of the 1766 statute was administrative in nature, defining the operation of a new weapon in the armoury of the justices in Scotland, rather than creating new crimes and punishments as had been done in England in 1717.<sup>95</sup> The distinction between banishment and transportation remained important. It became a central element in the parliamentary debates about the punishment of the Scottish martyrs in 1794, which is considered in Chapter 6.

The legislation of 1766, however, went one step further than just including Scotland within the ambit of statutory transportation. It offered, for the only time in the long legislative history of transportation, a justification for the concept of ‘property and interest in the service of the offender’. The parliament noted that:

the Colonies and Plantations to which such Offenders are transported, are exposed to many Dangers and Inconveniencies, by having such Offenders set loose amongst them, without any Person or Persons having a Property or Interest in their Service, whereby they may be restrained from committing new Crimes and Offences in the said Colonies and Plantations<sup>96</sup>

Unusually, the Westminster parliament appeared to have been responding to an administrative and public order problem in the American colonies, although there were no obvious references to the existence of such a problem mentioned in the published colonial correspondence.<sup>97</sup> The parliament was restating Sir Thomas Smith’s anxiety about the masterless man and conflating it with the need to maintain control through the imposition of an unidentified master who would

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<sup>95</sup> In an address to the House of Commons in 1799 the Scottish member of parliament William Adam referred to this approach as the use of ‘policing powers’ rather than a sentence as such. See *The Parliamentary Register*, Volume 38 (London, 1794), pp. 489-529, at p. 508

<sup>96</sup> 6 Geo III c. 32, Section I.

<sup>97</sup> This is the conclusion from an examination of the calendars of state papers for the period.

exercise control and discipline for the public good. The legislation of 1766 covertly differentiated the status of an offender transported from England in which a third party acquired a ‘property and interest in the service of the offender’ in that offender and an offender transported from Scotland prior to 1 April 1767 without any apparent status.<sup>98</sup> The conclusion to be drawn then is that, prior to the 1766 legislation there was no ‘property and interest in the service of the offender’ with respect to offenders transported from Scotland. This was the distinction identified by the Jacobite rebels in the period after the surrender at Preston in 1716.

Section II of the 1766 act addressed the circumstances of offenders from Scotland being sentenced to transportation pursuant to a conditional pardon, maintaining the distinction from 1717 of those under sentence, and those under conditional pardon. However, the formula with respect to Scotland was stated in the following terms, allowing that the contractor:

shall have the like Property and Interest in the Service of such Offenders, and for such Term of Years, as he or they would or might have had under the like Order from any competent Court in that Part of Great Britain called England.<sup>99</sup>

The final measure of improving the British legislative approach to transportation came in 1767. The circumstances of offenders outside clergy under the 1717 and 1719 legislation were precarious. Being outside clergy meant that, in the absence of any means of arresting judgement, the trial judge was obliged to pass sentence of death upon conviction. The convicted felon was, however, capable of appealing

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<sup>98</sup> The mechanism invoked was a mirror; that is the statute in Scotland was to operate as if the contractor had acquired the rights prescribed by the legislation in England. Unfortunately this point is lost in what would seem to be a drafting error in the last words of section I which refers to *Scotland* instead of *England*. This point was correctly stated in the subsequent section with respect to conditional pardons at the end of section II.

<sup>99</sup> 6 Geo III c.32, section II.

to the Crown for a conditional or absolute pardon. During this appeal period the trial judge issued a reprieve or respite of judgement. While this process was conducted through the trial judge and a secretary of state, the offender remained in the custody of a gaoler and under the control of the sheriff.<sup>100</sup> By 1768 the delays caused by the bifurcated process with respect to successful applicants for mercy had been recognised expressly in utilitarian terms. Even the statute recognised that offenders languishing in gaol for several months would be ‘rendered less capable of being useful to the Publick in the Parts of America to which they are sent’.<sup>101</sup>

Copying another provision from the Irish transportation regime, yet recognising the centrality of the role of the trial judge in recommending the offender ‘to His Majesty as a proper Object of his Majesty's Mercy’, the trial judge was now authorised to make an immediate order for transportation, ‘in the same Manner as if such Intention of Mercy had been signified to him by One of His Majesty's Principal Secretaries of State, during the Continuance of the Assizes.’<sup>102</sup> The act 6 Geo III c. 7 went on to restate the consequences of this process. In language reminiscent of 1717, and probably as redundant, but now applicable to those transported by way of conditional pardon and not by way of sentence, the act provided that ‘such Transportation shall have the Effect of a Pardon under the

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<sup>100</sup> The sheriff was permitted very little flexibility or discretion. On 10 April 1797 (slightly later than the period presently under consideration) the secretary of state, the duke of Portland admonished the high sheriff of Gloucester for the failure of the under-sheriff to execute a condemned offender awaiting a pardon. The under-sheriff had been told not to proceed with the hanging for fourteen days. Having heard nothing, on the fifteenth day the under-sheriff sought clarification from the Home Office, only to be told he should have proceeded when the time ran out. See Home Office Criminal Entry Books, HO 13/11, p. 148, TNA.

<sup>101</sup> 8 Geo III c. 15, Section I.

<sup>102</sup> Ibid. See Chapter 5 for the Irish precedent.

Great Seal for such Offender, as to the Crime of which he or she was so convicted.’<sup>103</sup>

So, by way of a response to the second question being considered here; how did the laws authorising transportation from England evolve after 1717? It is clear that English transportation legislation was framed by two principal statutes: 4 Geo I c. 11 of 1717 and 6 Geo I c. 23 of 1719. Subsequent modifications improved efficiency and administration. In 1766 the scope of the legislative scheme was extended to Scotland. From 1719 the scheme was underpinned administratively by HM Treasury, which paid a subsidy for each offender transported from London and the Home Counties and landed in America. As has been demonstrated, the concept of a ‘property and interest in the service of the offender’ was a 1717 response brought about by the difficulties involved in getting offenders to consent to the process of transportation by means of signing indentures as a condition precedent to their deportation. The legislative response addressed the difficulties faced by Sir Thomas Johnson in the aftermath of the surrender at Preston in 1716, while playing to the American colonial common law position of master and servant, more particularly servitude.

Turning now to the final question to be considered in this chapter; how did the British government respond to the disruption to transportation brought about by the American War of Independence?

During mid-1775 the British government received warnings about the impending refusal of the American colonies to admit vessels carrying goods or convicts.

Details about the response in England to such warnings are, surprisingly, poorly

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<sup>103</sup> *Ibid.* The ‘Great Seal’ was a reference to the Great Seal of Great Britain, not England.

recorded.<sup>104</sup> In January 1776 the transport ship *Jenny* carrying servants and convicts departed from Newcastle for America nevertheless. The *Jenny* arrived in the James River in Virginia in April and managed to disembark her cargo of convicts. This disembarkation brought to an end the regular practice of transporting offenders from Britain to America.<sup>105</sup>

With transportation disrupted, the magnitude of the problem facing the British government led by Frederick, Lord North, was calculated by the English prison reformer John Howard. In the spring of 1776 there were 994 felons, 653 petty offenders and 2,437 debtors in English gaols. Howard did not specify exactly how many of the 994 felons were awaiting transportation, but he did report specifically on the numbers transported from Newgate in the years 1773, 1774, and 1775. These were 435 in 1773, 420 in 1774, and 324 in 1775 indicating the approximate size of the annual accumulation of offenders awaiting transportation in the years immediately following.<sup>106</sup> Over the period 1762 to 1772 approximately 475 offenders were transported annually from Britain to America.<sup>107</sup> Meanwhile, compounding the problem and in accordance with the mandatory sentencing

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<sup>104</sup> Oldham, *Britain's Convicts to the Colonies*, p. 33. The British genealogist Peter Wilson Coldham has identified at least seven ships sailing from London and Bristol with convicts bound for Maryland and Virginia during 1775. Of these, at least five discharged their cargoes in America, while the status of the other two is uncertain. British newspapers recorded that at least one transport ship carrying felons had been refused admittance in mid-1775. Peter Wilson Coldham, *More Emigrants in Bondage 1614-1775* (Baltimore, 2002), p. 216.

<sup>105</sup> Ekirch, *Bound for America*, p. 229 and Coldham, *Emigrants in Chains*, p. 151. Although, it should be noted, that three 'experiments' were attempted in 1783-1785 to land further offenders in America in the period following the Peace of Paris between Britain and the American republic. These experiments are considered in Oldham, *Britain's Convicts to the Colonies*, pp. 83-94.

<sup>106</sup> John Howard, *The State of the Prisons in England and Wales with Preliminary Observations* (London, 1777), p. 33 and Table VII on p. 486.

<sup>107</sup> Oldham, *Britain's Convicts to the Colonies*, Appendix 6, p. 205. These numbers suggest an average transportation rate in excess of 400 but also support JM Beattie's argument that the use of transportation was in something of a decline. Beattie, *Crime and the Courts in England 1660-1800*, pp. 540 *et seq.*

provisions of the various criminal statutes, judges continued to sentence or order offenders to transportation to America despite its futility.<sup>108</sup>

The disruption of transportation to America was met in England with separate responses from the executive and the legislature. Much of the initial response rested with the parliament until around 1783 when the initiative passed to the executive, largely through the activities of the newly created office of the Home Department. Some these responses overlapped, but they were limited to England and Wales. No response was considered with respect to Scotland until 1785. Some aspects of the response in Ireland are considered in Chapter 5. By examining the legislative output for the period 1776 to 1785 it is possible to identify two different phases within the British response. These are summarised in Table 5.

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<sup>108</sup> Beattie, *Crime and the Courts in England 1660-1800*, p. 565. No one in the British government seems to have taken the point that the impossibility could have been sheeted home to the contractor. Subsequent events were based entirely upon the government accepting that it was its responsibility to find a suitable destination for transported offenders, leaving the contractors always as paid instruments of the government's policy.

**Table 5: A summary of statutory responses to the disruption to transportation to America**

	Year	Statute & Royal Assent	Response & Theme	Intended & actual Duration
<b>Phase 1</b>	1776	16 Geo III c. 43 23 May 1776	Hulks	2 years
	1778	18 Geo III c. 62 28 May 1778	Hulks	To 1 June 1779
	1779	19 Geo III c. 54 31 May 1779	Hulks	To 1 July 1779 later extended again
	1779	19 Geo III c. 74 30 June 1779	Penitentiary and hulks and an end of link with America	To 1 July 1784 but successively extended to 1821
<b>Phase 2</b>	1784	24 Geo III c. 12 24 March 1784	Hulks	Repealed 19 Geo III c. 54
	1784	24 Geo III c. 56 19 August 1784	Restatement of Hulks & Transportation regimes	Progressively extended until 1824
	1785	25 Geo III c. 46 4 July 1785	Extended 24 Geo III c. 56 to Scotland	Progressively extended until 1824

The first phase of the British response ended in 1779 with the enactment of the statute 19 Geo III c. 74. This phase saw the consolidation of the laws with respect to the use of the hulks, framed the later use of penitentiaries, and saw the first long term utilisation of hard labour as a punishment for crime. The legislative output of the parliament during this phase was dominated by the criminal law reform advocates led, in the House of Commons, by William Eden, the Under-Secretary for the Northern Department. Eden was supported both by the philosophical and drafting endeavours of Sir William Blackstone (by this time a judge in the court of Common Pleas), and the detailed factual and statistical analysis of the prison reformer John Howard.

With America closed as a destination to which to send convicts, the immediate response of the executive was pragmatic, though unsustainable. In January 1776 some female offenders were pardoned unconditionally, while some male



offenders were pardoned on condition of army service.<sup>109</sup> Another destination available to the British government had been West Africa. As early as 1769, in association with the activities of the Company of Merchants trading with Africa (the 'Africa Company') some condemned offenders had been reprieved on condition of service as either soldiers or servants in Senegal.<sup>110</sup> As events were later to show, the use of Africa as a destination was never fully developed. A small number of offenders were also despatched to Senegambia to serve the Africa Company.<sup>111</sup>

While these tentative measures were implemented, steps were taken to place some offenders awaiting transportation on to a ship already moored in the Thames.<sup>112</sup> This vessel was owned by Duncan Campbell, the business successor to John Stewart, the last of the major contractors engaged in shipping offenders from Britain to America.<sup>113</sup> The directives authorising the use of Campbell's ship was

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<sup>109</sup> Oldham, *Britain's Convicts to the Colonies*, p. 34. And see Alan Frost, *Botany Bay: The Real Story* (Melbourne, 2011), p. 58. The use of conditional pardons continued during subsequent years. Simon Devereaux points out that between 1776 and 1782 some 950 male offenders were conditionally pardoned on this basis, an annual average of approximately 135 offenders. Simon Devereaux, "The Making of the Penitentiary Act, 1775-1779," *The Historical Journal* Vol. 42, (June 1999), pp. 421-2.

<sup>110</sup> Oldham, *Britain's Convicts to the Colonies*, p. 68. Some aspects of the West African experience are considered below.

<sup>111</sup> Oldham, *Britain's Convicts to the Colonies*, p. 69. For a more detailed analysis of the various episodes involved in sending offenders to Africa see Oldham, pp. 65-95, and the more recent work of Emma Christopher: Emma Christopher, *A Merciless Place: The Lost Story of Britain's Convict Disaster in Africa and How It Led to the Settlement of Australia*, (Crows Nest, 2010).

<sup>112</sup> Byrnes suggests that this measure was illegal until the passage of legislation which occurred in May 1776. See The Blackheath Connection, Chapter 18: [www.danbyrnes.com.au/blackheath/thebc18.htm](http://www.danbyrnes.com.au/blackheath/thebc18.htm)

<sup>113</sup> Oldham, *Britain's Convicts to the Colonies*, pp. 28, 33-4. Duncan Campbell (born 1726) had joined Stewart in the transportation business in 1758 and continued to operate convict transports to America after Stewart died in 1772. Dan Byrnes, "Emptying the Hulks: Duncan Campbell and the First Three Fleets to Australia," *The Push from the Bush: A Bulletin of Social History*, 24 (1987), pp. 2-3. Campbell was to operate the hulks until 1801 and remained in an unofficial advisory role regarding the use and operation of the hulks and the processes of transportation during the early years of transportation to New South Wales. For a modern management view of Campbell's role see Gary Sturges's case study of Campbell's management of the hulks in Nigel Caldwell and Mickey Howard's *Procuring Complex Performance: Studies of Innovation in Product-Service Management*. Hoboken: Taylor and Francis, 2012. Ebook Library. Web. 24 Apr. 2013.

issued by Under-Secretary Eden. Before entering parliament in 1774, Eden had published *Principles of Penal Law* in 1771 in which, among other arguments, he had criticised the use of transportation, both with respect to its limited effect upon the offenders and the removal of useful labourers from the British economy.<sup>114</sup>

With the co-operation of Campbell and the availability of his vessel, the first legislative response of the British government was brought forward in the House of Commons in April 1776. Eden introduced a bill entitled: *An Act to authorise, for a limited Time, the Punishment by Hard Labour of Offenders who, for certain crimes, are or shall become liable to be transported to any of his Majesty's Colonies and Plantations*.<sup>115</sup> This act received royal assent on 23 May 1776 as the statute 16 Geo III c. 43.<sup>116</sup> The hulks were used to accommodate offenders in London undergoing hard labour. The recital to Eden's bill, somewhat ambiguously, and echoing the words of James I from 1614, addressed the immediate cause of the problem in the following terms:

Whereas the transportation of Convicts to his Majesty's Colonies and Plantations in *America*, now in Use within that Part of Great Britain called England, by virtue of the several Statutes authorising such Transportation, is found to be attended with various Inconveniences, particularly by depriving this Kingdom of many Subjects whose Labour might be useful to the Community, and who, with proper Care and Correction, might be reclaimed from their evil Courses:

The centrality of hard labour deployed through the hulks was the recognisable feature of the statute 16 Geo III c. 43. Hard labour was not new to the British criminal justice system. It had been invoked during the reign of Queen Anne

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<sup>114</sup> William Eden, *Principles of Penal Law* (London, 1771), p. 28. For an analysis of Eden's career see GC Bolton, "William Eden and the Convicts, 1771-1787," *The Australian Journal of Politics and History*, 26 (1980), 30-44.

<sup>115</sup> *JHC*, Volume 35 (1774-1776), p. 810.

<sup>116</sup> The act 16 Geo III c. 43 is popularly referred to as the 'Hulks Act', although the term 'hulk' was never used in the legislation.

(1702-1714) in the period when the practice of transporting conditionally pardoned offenders was falling into disuse at the beginning of the eighteenth century.<sup>117</sup> Hard labour after 1776 needs to be differentiated from the earlier use of hard labour in houses of correction, where it was deployed both as a punishment and as a corrective. It also needs to be differentiated from servitude in colonial America. Servitude carried the connotation of productive labour for a private master, not punitive labour for a public benefit. After 1776, hard labour was put to greater use and, according to the legislation passed during this time, became the defining purpose for which an offender was sent to the hulks. Hard labour was later to become a significant element in the punishment of transportation. However, hard labour also had another connotation. While the hulks provided a place of immediate, albeit temporary, accommodation, the hulks also anticipated a wider use of the punishment of imprisonment, which was to constitute the Government's response to the disruption to transportation.<sup>118</sup> The conflation of the ideas of transportation and hard labour was central to the opinion of the Law Officers of the Crown in 1817 on the status of convicts transported to New South Wales. This is examined in Chapter 6.<sup>119</sup>

Utilisation of the hulks was attractive to the government. Using ships maintained the perception of transportation, while engaging the offenders in a utilitarian

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<sup>117</sup> Beattie, *Crime and the Courts in England 1660-1800*, p. 568. Beattie sets out a brief history of the use of hard labour, particularly during the reign of Queen Anne when it was used as a response to 'lewd and disorderly' behaviour with offenders being sent to houses of correction if service in the army was not available. See pp. 492-500.

<sup>118</sup> Beattie, *Crime and the Courts in England 1660-1800*, p. 568.

<sup>119</sup> HB Simpson saw labour in the hulks as a further use of convict labour for public purposes. Dan Byrnes considered the use of labour in the hulks as marking the transfer of the labour of convicts from private use in America to public ownership in England. Neither view is correct. As later chapters demonstrate, the British government did not seek to alter the underlying framework of property in the services of convicts materialising on sentencing and depending upon the presence of a contractor. Simpson, "Penal Servitude: Its Past and Its Future", pp. 39, 41, and Byrnes, "Emptying the Hulks", p. 3.

outcome, which reflected the potential public benefit mentioned in the first recital.

A second recital designated the public benefit with greater precision:

such Convicts, being Males, might be employed with Benefit to the Public in raising Sand, Soil, and Gravel from, and cleaning the River *Thames*; or being Males unfit to so serve a Labour, or being Females, might be kept to hard Labour of another Kind within England;

The use of the hulks was not the only solution to the immediate problems faced by the government. Section XIII of the statute required that the justices across England were to prepare houses of correction ‘for the Reception of such Offenders as shall be ordered to Hard Labour therein’. This was to be in addition to their primary purpose of being for the detention and correction of vagrants and the idle poor. In effect, the use of houses of correction diversified the immediacy of the predicament brought about by the disruption to transportation. This diversification, however, was to carry the seeds of future implementation failure. Houses of correction were locally funded, while new criminal justice policy was being dictated from Westminster.<sup>120</sup> This remained a problem until Westminster eventually accepted the responsibility for both the costs of prisons and of transportation.

The contract for the operation of the hulks was awarded to Duncan Campbell on 13 August 1776. In accordance with the legislation, Campbell was appointed Overseer by the justices for Middlesex under the overall supervision of a Secretary of State.<sup>121</sup> Pursuant to Section IV, in language that evoked the passing and conveying of vagabonds, offenders were to be sent to the hulks to help in the cleaning up of the River Thames. The cost of passage to London was to be borne

<sup>120</sup> Devereaux, "The Making of the Penitentiary Act, 1775-1779", pp. 405-433, at p. 422.

<sup>121</sup> Oldham, *Britain's Convicts to the Colonies*, p. 36. See also Beattie, *Crime and the Courts in England 1660-1800*, p. 566. See also Dan Byrnes, *The Blackheath Connection*, Chapter 19. [www.danbyrnes.com.au/blackheath/thebc19.htm](http://www.danbyrnes.com.au/blackheath/thebc19.htm).

by the sentencing county. The fiction maintained throughout the despatch of an offender from a local gaol to the hulks and, thereafter, during the sentence, was that the offender was still undergoing transportation. Speaking to the House of Commons on 11 March 1784, the Solicitor-General, Richard Pepper Arden, referring to the then number of offenders currently in the hulks on the Thames, pointed out that, 'while they remained, as they did at present, on ship-board in the river, they were in the eye of the law supposed to be there only as on their way to America.'<sup>122</sup>

In the 1776 legislation, the overseer was vested with the same powers of custody as a sheriff or gaoler.<sup>123</sup> In effect, then, in 1776, apart from the punishment being performed in England, the operation of the statute 16 Geo III c. 43 was to keep an offender undergoing the sentence of hard labour in the hulks within the custodial regime of the court, the sheriffs, and the gaolers. The overseer was to allocate labour as he saw fit. Contrary to the assertion of the Australian historian Dan Byrnes, no mention was made in the legislation of any 'property in the service of the offender'.<sup>124</sup> Since the offender's punishment was to be completed entirely in England without any transportation, the absence of any rights being acquired by the hulk contractor seems to be a logical outcome of the imprisonment process, despite the views expressed by Solicitor-General Arden above.

The passage of legislation in the period 1776 and its extension in 1778 as depicted in Table 5 masked a series of more intricate political manoeuvres during the period. Much of the detail is beyond the scope of this thesis, but is described in

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<sup>122</sup> William Cobbett, *The Parliamentary History of England*, volume 24, (London, 1815), column 756.

<sup>123</sup> See Section V.

<sup>124</sup> Byrnes, "Emptying the Hulks", p. 3.

detail in Simon Devereaux's, 'The Making of the Penitentiary Act, 1775-1779'.<sup>125</sup>

A measure of this activity can be seen in the introduction of at least three bills into the House of Commons during the period 1776 to 1779 to address aspects of the utilisation of hard labour, the maintenance of the local houses of correction, and the building of centralised 'houses of hard labour'.<sup>126</sup> The provisions of the 1776 statute 16 Geo III c. 43 was only intended to have a limited life. Section XXIII provided that the statute would continue in force for only two years. In 1778, in the absence of any available alternative to the government, the 1776 statute was extended for two more years by the statute 18 Geo III c. 62. This extension process was repeated again in 1779 by the statute 19 Geo III c. 54 before any major response in the form of an alternative to transportation appeared in the penitentiary legislation of 1779 which constituted the commencement of the second phase of the government's response to the disruption of transportation to America.

One final etymological aspect of the 1776 statute, 16 Geo III c. 43, should be noted. The first and second recitals (quoted above) were the first, in a statutory sense, to use the word 'convict'. Prior to 1776 and, indeed, in the rest of the text of 16 Geo III c. 43, the word 'offender' or 'felons and other offenders' was the normal reference. This became the standard reference in all subsequent British

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<sup>125</sup> Devereaux, "The Making of the Penitentiary Act, 1775-1779",

<sup>126</sup> On 14 May 1776 a bill *to authorize the punishment by hard Labour of Offenders, who for certain Crimes are or shall become liable for transportation to any of His Majesty's Colonies and Plantations: and to establish proper Places for the Reception of Such Offenders:* was introduced under the auspices of Lord North. *JHC*, Volume 35 (1774-1776), pp. 796-7. On 11 May 1778 a bill *to punish, by Imprisonment and Hard Labour, certain Offenders; and to establish proper Places for their Reception* was introduced. *JHC*, Volume 36 (1776-1778), p. 970. On 4 March 1779 a bill *for the better Regulation of Prisons, and Houses of Correction, within the Kingdom of England and the Dominion of Wales* was introduced into the House of Commons. *JHC*, Volume 37, (1778-1780), p. 199. Devereaux argues that while some of these bills failed, some were intended to fail, being used as stalking-horses to draw conservative opposition. Devereaux, "The Making of the Penitentiary Act, 1775-1779", pp. 430-432.

transport legislation until 1824. The utilisation of ‘convict’ in 16 Geo III c. 43 would appear to run in parallel with the concurrent debates about the future of transportation already mentioned.

The temporary duration of the 1776 statute 16 Geo III c. 43 was underscored by a call from the House of Commons at the end of 1778 for a statistical ‘Account of Persons convicted of felonies or Misdemeanours, and now under Sentence of Imprisonment in the Gaols and Houses of Correction’ in London and the Home Counties.<sup>127</sup> The resulting returns were passed to a committee under the chairmanship of Sir Charles Bunbury the following February.<sup>128</sup> Bunbury presented a comprehensive report on 1 April 1779 which recommended the continued use of the hulks, while recognising that:

it might be of Public Utility, if the Laws which now direct and authorize the Transportation of certain Convicts to His Majesty’s Colonies and Plantations in *North America*, were made to authorize the same to other Parts of the Globe, that may be found expedient.<sup>129</sup>

Bunbury’s report initiated a series of activities ,which resulted in a new direction being adopted with respect to the punishment of offenders. Building on the work of the 1778 House of Commons committees, Bunbury introduced a bill *to explain and amend the Laws now in being relating to the Transportation and the Imprisonment of Offenders*.<sup>130</sup> The received royal assent on 30 June 1779 as the

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<sup>127</sup> 16 December 1778. *JHC*, Volume 37 (1778-1780), p. 53.

<sup>128</sup> Sir Charles Bunbury was a long term member of the House of Commons with an interest in justice and humanitarian affairs but he expressed no ambitions towards higher office. He was an associate of Fox. He retired in 1812 and died in 1821.

<http://www.historyofparliamentonline.org/volume/1754-1790/member/bunbury-thomas-charles-1740-1821>. Accessed 3 February 2015.

<sup>129</sup> *JHC*, Volume 37 (1778-1780), p. 314. The full report is set out at pp. 306-315. The Committee noted the suggestion from (the then) Mr Joseph Banks that the place ‘most expedient to establish a Colony of convicted Felons in [a] distant Part of the Globe’ would be Botany Bay on the coast of New Holland; p. 311.

<sup>130</sup> *JHC*, Volume 37 (1778-1780), p. 334. The bill contemplated the building of two penitentiaries, one for men and one for women.

statute 19 Geo III c. 74, and is often referred to as ‘the Penitentiary Act’.<sup>131</sup> But for the fact that the major provisions of 19 Geo III c. 74 were never implemented, the legislation was, nevertheless, important to the development of the status of offenders ordered for transportation but unable to embark and forced to remain in Britain.

The legislation marked a major turning point in the evolution of British public policy with respect the management of criminal justice. Although the concepts of ‘Care and Correction’ mentioned in the recital to 16 Geo III c. 43 two years earlier were not mentioned in the 1779 legislation, their implementation underpinned the new legislative framework. While the penitentiaries were to act as a deterrent to crime, they were also to provide opportunities for reform and ‘inuring’ offenders to ‘Habits of Industry’.<sup>132</sup> This was to be achieved by the combined use of solitary imprisonment, well-regulated labour, and religious instruction, principles which were to re-surface in the Australian colonies in the 1820s. The presiding officer (the ‘governor’) was invested with the same powers over offenders in his custody as were held by sheriffs and gaolers.<sup>133</sup> In a shift in emphasis from Eden’s earlier policy where hard labour was to have a public benefit, hard labour was now to be a punishment devoid of economic value, but it had to be consistent with the offenders ‘sex, age, health, and ability’ and those of less ability were to be employed on less laborious work. While it was not specifically stated, the legislation appeared to contemplate the hard labour of the offender being utilised within the confines of the penitentiary. As in 1775, no mention was made of any

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<sup>131</sup> *JHL*, Volume 35 (1774-1776), p. 811.

<sup>132</sup> Section V recital.

<sup>133</sup> Sections XXXI and XXXII.



‘property in the service of the offender’ undergoing hard labour nor was ‘property in the service of the offender’ acquired by the governor of the penitentiary.

The statute 19 Geo III c. 74 was not only concerned with hard labour in the penitentiaries: it also extended the operation of the hulks until 1 July 1784. The legislation still recognised America as the destination for transported offenders but, again, observed that ‘the Punishment of Felons, and other Offenders, by Transportation to his Majesty’s Colonies and Plantations in America, is attended with many Difficulties’.<sup>134</sup> The possibility of other destinations was then contemplated in the broadest terms. From 1 July 1779, where conviction would previously have ended up in a sentence of transportation to America, courts were thereafter empowered, ‘if such Court shall think fit, to order and adjudge that such Person shall be transported to any Parts beyond the Seas, whether the same be situated in America, or elsewhere.’<sup>135</sup> No mechanism was mentioned as to how a court would ‘think fit’.

Curiously, for legislation which had such profound administrative and long term policy implications, the final section of 19 Geo III c. 74 contained a sunset provision. The act was to continue in force only until 1 June 1784 (that is, six years).<sup>136</sup> Between 1779 and 1784, however, plans to implement a penitentiary proved elusive.<sup>137</sup> No penitentiary was built in England pursuant to the legislation until the commencement of construction of Millbank Prison at Pimlico, London,

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<sup>134</sup> Section I.

<sup>135</sup> Section I. It was this provision of the legislation which prompted Dan Byrnes to describe the first reading of the legislation as ‘inane’. See [www.danbyrnes.com.au/blackheath/thebc27.htm](http://www.danbyrnes.com.au/blackheath/thebc27.htm).

<sup>136</sup> Section LXXIV.

<sup>137</sup> See the report of Sir Charles Bunbury to the House of Commons on 22 March 1784, *JHC*, Volume 39 (1782-1784), pp. 1040-41 and see Bolton, “William Eden and the Convicts, 1771-1787”, p. 40.

in 1812. In the meanwhile, the provisions of 19 Geo III c. 74 were extended during 1784 and repeatedly in the years following.<sup>138</sup>

The passage of the 1779 penitentiary legislation, 19 Geo III c. 74, ended the first phase of the British government's response to the disruption of transportation to America. Whilst attendant with difficulties and complaints, the hulks proved a useful and cost effective stop gap.

The second phase of the British legislative response to the disruption to transportation turned back from examining the possibilities of prison reform to the possibility of reviving transportation itself. While the erection of penitentiaries had proved difficult, a revival of laws with respect to transportation was more easily accomplished. Transportation from Britain had not entirely ceased after 1775. Two separate experiments were tried, the first involved sending conditionally pardoned felons to West Africa; the second involved re-establishing America as a destination. Still the most comprehensive treatment of this period in the literature is Oldham's *Britain's Convicts to the Colonies*.<sup>139</sup> Oldham reflects on the various schemes by which offenders were sent to locations in West Africa. Oldham did not consider whether the parties carrying offenders to these locations ever acquired any property in the service of the offenders. Emma Christopher's more recent work on the convicts despatched to West Africa and the extreme deprivation of their circumstances is tellingly described in *A Merciless Place*, but Christopher, like Oldham, made no mention of the processes of transporting

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<sup>138</sup> A summary of the extending legislation for 19 Geo III c. 74 is as follows: extended to 1 June 1787+ by 24 Geo III, c. 56; extended to 1 June 1793+ by 28 Geo III, c. 24; extended to 1 June 1799+ by 34 Geo III, c. 60; extended to 25 March 1802+ by 39 Geo III, c. 51; extended to 25 March 1805+ by 42 Geo III, c. 28; extended to 25 March 1813 by 46 Geo III, c. 28; extended to 25 March 1814 by 53 Geo III, c. 36; extended to 25 March 1815 by 54 Geo III, c. 30; and extended to 1 May 1821 by 56 Geo III, c. 27.

<sup>139</sup> Oldham, *Britain's Convicts to the Colonies*.

offenders to West Africa.<sup>140</sup> The material that follows draws on the most useful summary of these events by Oldham. They are summarised here for completeness.<sup>141</sup>

In 1769, while transportations to America continued, the British government had experimented with sending small numbers of condemned felons, pardoned upon condition of serving in Africa, to support British companies trading in slaves and spices on the West African coast.<sup>142</sup> This was despite negative reports about conditions in West Africa before the House of Commons 1779 Committee.<sup>143</sup> During 1779 and 1781 small numbers of offenders had been sent to Gambia in West Africa or to the Cape Coast Castle as convicts or soldiers. The attempt to land convicts in America between 1783 and 1785 proved a failure. The level of these transportation activities was never on a scale sufficient to alleviate problems with overcrowding in the gaols and hulks but it was sufficient to keep the prospect of transportation alive in the minds, both of the executive (the newly formed Home Department) and of the parliament. Before considering the future course of the transportation legislation, it is useful therefore to consider the shape of the West African and American experiments for their impact upon the future course of transportation from Britain.

The African Companies had faced one constant problem: a shortage of manpower exacerbated by the debilitating effects of the climate which reduced whatever European labour arrived in the region to near ineffectiveness within a short

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<sup>140</sup> Christopher, *A Merciless Place*.

<sup>141</sup> Oldham, *Britain's Convicts to the Colonies*.

<sup>142</sup> Oldham, *Britain's Convicts to the Colonies*, p. 68.

<sup>143</sup> Oldham, *Britain's Convicts to the Colonies*, p. 72.

period.<sup>144</sup> Government insistence, nevertheless, that offenders be sent there raised questions of the Government's attitude. Were these convicts being sent to their deaths? The House Committee had observed that one outcome might be that 'atrocious criminals might be sent to labour and their lives [thereby] hazarded'.<sup>145</sup> This merely exacerbated the perception, shared among the convicts, that the British government had no intention of returning them to Britain after the expiry of their terms and, when the war had ended, their suspicions proved to be correct.<sup>146</sup> The British government gave every indication that it was intended that offenders sentenced, not to death, but to transportation, were to perish in West Africa. While there was no evidence of systematic cruelty, Oldham concluded that the use of transportation to West Africa as an experiment to relieve the pressure on British gaols brought little credit to the government.<sup>147</sup>

The possibility of re-opening America as a destination for transportation remained tantalising, at least in London. Even before the completion of the Treaty of Paris between the government of George III and the Congress of the American Confederation in September 1783, a further cargo of convicts left England for America in August 1783. The contractor, George Moore, was to be involved in transportation from Britain over the next three years. Moore's contract was presumably signed in August 1783.<sup>148</sup> The prevailing legislation covering such transportation was the scheme contained in 4 Geo I c. 11 of 1717 and 6 Geo I c.

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<sup>144</sup> Oldham, *Britain's Convicts to the Colonies*, pp. 67-8.

<sup>145</sup> Oldham, *Britain's Convicts to the Colonies*, p. 79.

<sup>146</sup> Oldham, *Britain's Convicts to the Colonies*, p. 77.

<sup>147</sup> Oldham, *Britain's Convicts to the Colonies*, p. 79.

<sup>148</sup> Oldham, *Britain's Convicts to the Colonies*, p. 85. Oldham calculated this date from references made by Lord North.

23 of 1719, as modified subsequently.<sup>149</sup> In theory, therefore, Moore would have acquired a property and interest in the service of the offenders he transported from England to America.

George Moore proved to be a luckless transportation contractor. Convicts from Newgate were loaded onto a ship in London in August 1783, but only after a few had escaped. After the vessel sailed, a mutiny broke out and more convicts escaped in England, before Moore was able to land seventy convicts in Maryland on 31 December 1783.<sup>150</sup> A second shipment of convicts, intended for America, was assembled in March 1784 and sailed in April only to mutiny, this time off Torbay.<sup>151</sup> This was some two weeks after royal assent had been given to the 1784 statute 24 Geo III c. 12 considered below. With a reduced cargo of eighty-six convicts, Moore's vessel sailed to Maryland or Virginia but was refused entry. In July 1784 the convicts arrived in Belize in Honduras, then a sparsely populated British territory operating timber concessions from the Spanish government. In Honduras it proved extremely difficult to sell the convicts because of work restraints imposed by the Spanish. Sensing a reduction in their wage rates brought about by an influx of convict labourers, the landing and deployment of the convicts was greeted with hostility and opposition by the resident British population. Eventually, some of the convicts appear to have been absorbed into the British community in Honduras and some may well have perished after being dumped on a deserted island in the Caribbean.<sup>152</sup>

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<sup>149</sup> 24 Geo III c. 12 of 1784 confirms this application – see Section II.

<sup>150</sup> Oldham, *Britain's Convicts to the Colonies*, p. 85.

<sup>151</sup> Oldham, *Britain's Convicts to the Colonies*, p. 87.

<sup>152</sup> Oldham, *Britain's Convicts to the Colonies*, pp. 88-92. See also Mollie Gillen, "His Majesty's Mercy: Circumstances of the First Fleet," *The Push, A Journal of Early Australian Social History*, 29 (1991), pp. 62-75, and pp. 75-82.

Undeterred by large financial losses, Moore determined upon a third shipment of convicts, this time to take twenty-nine convicts directly to Honduras. A contract was put in place in September 1785.<sup>153</sup> This cargo met a similar fate to the earlier arrival in Honduras, being rejected by the local British population. The convicts were eventually landed on the Mosquito Shore and their fate is uncertain because of the poor records. The upshot of George Moore's three unsuccessful attempts to transport convicts into America confirmed to the British government that the prospects of any further transportation to America was now completely impossible. These manoeuvrings still left Moore 'in possession' of convicts in England. They were to lead to the first recorded assignment of property in the service of the convicts in April and June 1787 mentioned in the next chapter.

It is now possible to respond to the question: how did the British government respond to the disruption to transportation brought about by the American War of Independence? The transportation regime between 1717 and 1775 had been based upon banishment from England and private servitude in America. With this arrangement disrupted, hard labour in the hulks for a public purpose under the supervision of a state employed overseer was utilised in substitution. How events developed during and after 1784 is the subject of Chapter 4.

Before turning to the events of 1784, a development in March 1782 should be noted. Immediately prior to the demise of the Tory government of Lord North, alterations were made to the duties of the (then) two Secretaries of State, one having been in charge of the Northern Department, the other of the Southern

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<sup>153</sup> Oldham, *Britain's Convicts to the Colonies*, p. 93. This would have been the first transportation contract under the new transportation regime of 24 Geo III c. 56.

Department.<sup>154</sup> Under the incoming Whig administration of Charles Watson-Wentworth, Marquess of Rockingham, the responsibilities of the secretaries of state were rearranged; one secretary of state attending to foreign matters and the other to domestic, or Home, affairs.<sup>155</sup> The immediate consequence of this reorganization was short lived. Lord Rockingham died in office in July 1782 and the first Secretary of State for the Home Department, Lord Shelburne, succeeded Rockingham as First Lord of the Treasury. Between July 1782 and December 1783 three different men occupied the position of Secretary of State for the Home Department: Thomas Townsend, Lord North, and Earl Temple. On 23 December 1783 Thomas Townsend, now Viscount Sydney, resumed the role and remained in that position until after the foundation of a colony in New South Wales.<sup>156</sup>

This reorganisation of the British government is rarely considered in the literature with respect to the evolution of transportation, particularly during the second phase of the British government's response to the end of transportation to America.<sup>157</sup> Perhaps more significantly, stability in the position of Secretary of State for the Home Department enabled the employment of efficient and competent officers within the department. In particular, during the period in which the search for an alternative destination was being investigated, the position of

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<sup>154</sup> Ronald Roy Nelson, *The Home Office, 1782-1801* (Durham, NC, 1969), p. 5. Broadly, the Northern Department maintained an interest in the affairs of the protestant North of Europe and the Southern Department an interest in Catholic Europe. Both departments acted in matters concerning the administration of justice and access to the crown with respect to appeals for pardons. A third secretary of state had formerly attended to matters concerning Colonial America.

<sup>155</sup> Nelson, *The Home Office, 1782-1801*, pp. 5-6, points out that there is surprisingly little formal record of this reorganisation having taken place.

<sup>156</sup> Nelson, *The Home Office, 1782-1801*, pp. 11, 13, 14, 15.

<sup>157</sup> Shaw, *Convicts and the Colonies*, pp. 47-9. Shaw discusses the activities of the Home Department with respect to plans for resuming transportation, but overlooks any reorganisation in the affairs of the ministry. Alan Frost comments on the role of Thomas Townshend, Viscount Sydney, in the Rockingham administration but makes no comments on the reorganisation of the government at the time. Alan Frost, *Convicts and Empire: A Naval Question 1776-1811* (Melbourne, 1980), pp. 6, and 9.

Under-Secretary was occupied by the highly competent Evan Nepean. Nepean oversaw much of the organisation for the assembly and despatch of the First Fleet to Botany Bay in the period August 1785 to May 1787. This is not to say that the Home Department was formed fully competent and functional. Some of Nepean's evidence to the first Beauchamp committee was precise on the statistics but at odds with most the reliable evidence on the suitability of Lemane Island as a penal settlement.<sup>158</sup> Lord Sydney likewise was not always across his brief and some of his attempts to revive the trade of convicts into America in the period 1783 to 1786 smack of opportunism and lack of sound policy.<sup>159</sup> As events were to demonstrate, some aspects of the organisation of the First Fleet under the overall direction of the Home Department were found wanting.

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<sup>158</sup> See *JHC*, Volume 40 (1784-1785), p. 1161 and Oldham, *Britain's Convicts to the Colonies*, p. 88.

<sup>159</sup> Nelson, *The Home Office, 1782-1801*. Of the first six secretaries of state for the Home Office, Nelson characterised Sydney, while not incompetent, at least as 'unenergetic', p. 25. Alan Atkinson has taken a more constructive view of the role of Lord Sydney, particularly the influence of his liberal sympathies and their impact of the development of legal institutions in early New South Wales. Alan Atkinson, *The Europeans in Australia: A History* (Oxford, 1997), pp. 55, 58.



## **Chapter 4: The legislation of 1784 and the revival of transportation**

In October 1795 John Hunter, the Governor of New South Wales, had written to London pointing out that the servitude of some convicts newly arrived in New South Wales had not been assigned to him, as was ‘customary’. The purpose of the assignment was, in Hunter’s words, ‘in order to their being disposed of for the benefit of the public’.<sup>1</sup> This chapter looks at the processes that had been put in place in order to deliver convicts transported from England to New South Wales into ‘servitude’. These developments are considered through two questions: first, what were the ‘customary’ processes put in place for the assignment of property in the service of the offenders to the governors of New South Wales? Second, how did the ‘customary’ processes evolve after Governor Hunter’s despatch to London in 1795?

In addressing the first question, what were the customary processes put in place for the assignment of property in the service of transported offenders to the governors of New South Wales, it is necessary to look to legislation passed in England in 1784. With the penitentiary and the hulks legislation due to expire on 1 June 1784, the House of Commons initiated a series of inquiries into the state of existing or obsolete transportation legislation. A committee, chaired by Sir Charles Bunbury, was appointed at the end of 1783 to ‘amend and bring in a Bill to continue’ 19 Geo III c. 74 (the Penitentiary Act).<sup>2</sup> On 1 March 1784 the interests of the House of Commons were extended across a range of related activities including the temporary accommodation of ‘Criminals’ under sentence

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<sup>1</sup> Hunter to Portland, 25 October 1795; *Historical Records of Australia, Series 1* (hereinafter 1 *HRA*), Volume 1, p. 542. See thesis Introduction.

<sup>2</sup> *Journal of the House of Commons* (hereinafter *JHC*), Volume 39 (1782-1784), p. 844.

of transportation, the accommodation of ‘sick’ Prisoners, and the building of County Gaols by the justices. At the same time, the House of Commons made efforts to consider earlier forms of statutory measures with respect to putting the poor to work and the provisions of the 1717 statute 4 Geo I c. 11.<sup>3</sup> On 9 March 1784 Bunbury’s committee was increased in membership from three to forty-seven. As well as William Eden, the Attorney-General, the Solicitor-General, and ‘all the Gentlemen of the Long Robe, Sea Officers, and merchants of the House’, the committee included Lord Beauchamp.<sup>4</sup> The work of the committee appeared as a bill for *An Act to authorize the Removal of Prisoners in certain Cases, and to amend the Laws respecting the Transportation of Offenders*. The bill received royal assent on 24 March 1784 as the statute 24 Geo III c. 12.<sup>5</sup>

The recital to the statute pointed out that ‘difficulties’ had occurred in carrying out sentences and orders of transportation. This had resulted in ‘Want of convenient and sufficient Room’ in the gaols which, if some ‘immediate Provision’ is not made, would result in ‘very dangerous Consequences’.<sup>6</sup> The response to the ‘dangerous Consequences’ was to be the continued use of the hulks, referred to in the legislation as ‘Places of Confinement within England ... either at Land, or on board any Ship or Vessel in the River Thames’ or any other navigable river.

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<sup>3</sup> See *JHC*, Volume 39 (1782-1784) for 1 March 1784, p. 963; 2 March 1784, p. 968; 9 March 1784, pp. 982-3; 11 March 1784, p. 990; and 12 March 1784, p. 993.

<sup>4</sup> *JHC*, Volume 39 (1782-1784), pp. 982-3. The Attorney-General was Lloyd Kenyon who left office at the end of March 1784; the Solicitor General was Richard Pepper Arden. Francis (Ingram) Seymour-Conway, Lord Beauchamp, was heir to the marquise of Hertford, a member of Lord North’s cabinet and, later, a member of the royal household. T. J. Hochstrasser, ‘Conway, Francis Ingram-Seymour-, second Marquess of Hertford (1743–1822)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2008 [<http://www.oxforddnb.com/view/article/25167>, accessed 3 Feb 2015]. Beauchamp chaired the committee from 1785. This reflected his, and his family’s, desire for preferment, rather than any abiding interest in criminal justice.

<sup>5</sup> *JHC*, Volume 39 (1782-1784), pp. 1048 and 1050. Dan Byrnes attributes authorship of the legislation to Solicitor-General Richard Pepper Arden.

<sup>6</sup> 24 Geo III c. 12, Section I

Compared with the 1779 legislation carefully drafted by Sir William Blackstone, the act of 1784 lacked direction and was clearly intended to be of short duration.<sup>7</sup> As if to underscore the temporary nature of the use of the hulks, offenders sent to the hulks were to remain there until they were actually transported, or until their term expired, or unless they were returned to gaol by proper order. The second half of 24 Geo III c. 12 addressed an apparent oversight from 19 Geo III c. 74. The earlier act of 1779 had addressed the possible resumption of transportation ‘to any place beyond the Seas’. But in 1784 it was recognised that no parallel provision had been included to address the role of the transportation contractor. This oversight was rectified in Sections X and XI of the act. In a direct reference back to the 1717 statute 4 Geo I c. 11, the contractor who undertook the transportation of an offender out of England was granted a ‘property and interest in the service of the offender’.<sup>8</sup>

The legislation enabled the King, or justices authorised by the King, to order male offenders awaiting a sentence of transportation or under a conditional pardon to be sent to a hulk.<sup>9</sup> There they would be placed into the custody of an overseer, who was to hold the same powers as a sheriff or gaoler. The overseer could punish misbehaviour or disorderly conduct, but was required to maintain, feed, and clothe

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<sup>7</sup> Section XV stated that legislation was to remain in effect ‘for One Year’. This was subject to the usual provisos that it continue thereafter until the end of the then session of the Parliament.

<sup>8</sup> The inclusion of ‘property and interest in the service of the offender’ in the legislation may explain Dan Byrnes’s misunderstanding of the use of this formula when, in reality, it was more a piece of housekeeping rather than any alteration in the nature of the formula.

<sup>9</sup> *Ibid.*, Section II. There was a health constraint, the offender ‘on the examination of an ‘experienced Surgeon or Apothecary, shall appear to be free from any putrid or infectious Distemper, and fit to be removed from the Gaol’.

the prisoners in his care ‘as nearly in Conformity to the Treatment of Persons committed to Houses of Correction as the Nature of the Case will allow.’<sup>10</sup>

Two provisions of the act have raised difficulties. First, as mentioned in Chapter 3, Dan Byrnes argued that the statute, ‘could in theory have pre-empted the King in his exercise of his prerogative’ with respect to transportation. The provisions that offended Byrnes are contained in Section XI, which allowed the justices to substitute alternate destinations for transportation. Byrnes appears to be drawing too long an argument. Section XI contemplated circumstances where a transportation ‘Order cannot be conveniently executed with respect to the Place in such Order mentioned’. Should this have occurred, the King’s Bench or the trial or other court could substitute an alternative destination. The condition was that the substitute destination had to ‘appear to such Court proper for the Purpose’. Against a background of no clear destination being settled by the executive, but, as indicated above, alternatives in West Africa and America being trialled by, or with the sanction of, the Home Department, the provision allowing substitute destinations for transportation would appear reasonable. A comparable provision was included in section XIII of the subsequent legislation, 24 Geo III c. 56 and drew no criticism from Byrnes.<sup>11</sup>

The second provision of 24 Geo III c. 12 proved more problematic. Section IV permitted offenders to receive half their earnings while working in the hulks. The intention was to encourage labour and was bolstered by a further provision in

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<sup>10</sup> Sections IV and VII. The overseer was not, as claimed by Byrnes, given a property and interest in the service of the offender. See above.

<sup>11</sup> This mechanism was actually invoked prior to the departure of the First Fleet in 1787 when two barons from the Exchequer (Chief Baron Eyre and Baron Hotham) altered the destination of nineteen female convicts sentenced to transportation to America or Africa to New South Wales. See Privy Council Office Correspondence: Orders in council File HO 31/1, The National Archives.

Section V to the effect that ‘nothing contained in this Act shall extend to authorise putting to Labour any Person, whilst he continues confined by virtue of this Act, who shall not consent thereto.’ In supporting the inclusion of provisions requiring the consent of an offender to undergo hard labour, the Whig Secretary of State, Charles James Fox, told the House of Commons on 11 March 1784, ‘... though he would not like to see convicts be idle, still he would be loath to concur in condemning them to hard labour, when the law of the country had barely sentenced them to transportation.’<sup>12</sup> Fox went on to point out that conditional pardons offered by the King were for transportation, not capital punishment. There was no choice of confinement at hard labour and he, Fox, thought it ‘dangerous to alter anything in the punishment after [the] option [was] made.’<sup>13</sup> In effect, Fox viewed transportation as the alternative to hard labour, not an aspect of it. The solicitor general, Richard Pepper Arden, took a similar view:

Gentlemen did not think that persons under sentence of transportation ought to be compelled to hard labour in the places to which they should be removed from the gaols. In compliance to those gentlemen, he would consent to leave out the word ‘hard’, but he could not conceive that it would be improper to make them work for their subsistence.<sup>14</sup>

Aspects of this argument re-emerged in New South Wales in 1795 and 1817.

Other than irregular parliamentary oversight, the only supervision of the overseer of the hulks came through a requirement for sworn returns to be lodged with King’s Bench on the first day of every law term.<sup>15</sup> As before, as if to underscore the temporary nature of the use of the hulks, pursuant to Section XV 24 Geo III c. 12 was to be effective for one year, calculated from 25 March 1784. Although,

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<sup>12</sup> *The Parliamentary History of England*, Volume XXIV, (London, 1815), p. 757.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 756.

<sup>15</sup> Section VIII. The Australian Marxist historian Ken Dallas argued that the hulks always remained in and were administered by the Navy, but there is little support for this proposition. See Dallas, “Slavery in Australia - Convicts, Emigrants, Aborigines”, *Tasmanian Historical Research Association, Papers and Proceedings*, 16 (1968), pp. 61-76 at p. 64.

seemingly at odds with the intended short duration, Section XII required that the expenses incurred in implementing the statute ‘shall be annually laid before both Houses of Parliament.’

The voluntary nature of hard labour posed immediate difficulties. Duncan Campbell sought the government’s instructions as to how the provision of voluntary labour was to be administered.<sup>16</sup> Clearly, a new approach was needed and, by July 1784, within four months of royal assent being given to the legislation, a revised approach was put before the House of Commons. New legislation passed through the Commons by 13 August 1784, was returned from the Lords by 19 August 1784, and received royal assent on the same day with the title: *An Act for the effectual Transportation of Felons and other Offenders, and to authorize the Removal of prisoners in certain Cases; and for other Purposes therein mentioned.*<sup>17</sup> This statute, 24 Geo III c. 56, provided the legislative framework against which transportation to Botany Bay was initiated two years later. The new act addressed two broad issues: it consolidated the mechanics of transportation, and then it repealed and replaced the hulk legislation of 1783 (24 Geo III c. 12). The provisions of the act with respect to transportation are considered first.

At the time of the passing of the legislation, no firm decision had been made with respect to a suitable destination to which to send transported offenders although active discussions were underway as mentioned below. Without attempting to resolve the issue, the new statute adopted a more systematic approach. It simply vested authority in the King in council to designate the destination. While leaving options open, the new process set in train a cumbersome and bureaucratic procedure that was to be a feature of all subsequent transportation from England until 1824.<sup>18</sup> A further provision covered the contingency where an offender could not conveniently be transported to the place mentioned in their sentence. In such

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<sup>16</sup> Wilfred Oldham, *Britain's Convicts to the Colonies* (North Sydney, 1990), p. 55.

<sup>17</sup> *JHC*, Volume 40 (1784-1785), for 13 August 1784, p. 440, for 19 August, p. 446.

<sup>18</sup> The statute only applied to transportations from England and Wales. A further statute, passed the following year, extended the provisions of this statute to Scotland. See 25 Geo III c. 46 considered in Chapter 6.

circumstances the King in council or the Court of King's Bench were authorised to substitute an alternative destination.<sup>19</sup>

The new statute did not attempt to codify the existing transportation regime; it was concerned with process. Legislation from 1717 onwards had defined what offences would result in transportation. From the outset, the right of the transportation contractor to acquire 'property in the service of the offender' was repeated, although the formula was now shortened by the omission of the words 'and interest'. This alteration would not appear to have had any substantive effect, although the fact that no destination was in contemplation would now throw the contractors' statutory right into some confusion. From 1717 until the end of transportation to America in 1776 the contractor's right had relevance in the context of the common law that had developed in colonial America, particularly the status of servitude. With no country of destination in contemplation, the contractors' right would attract almost any interpretation.

An alteration was also made with respect to the securities to be given to secure the 'effectual transportation' of offenders. Since 1717 the transportation contractor had been required to provide security to the contracting court. The statute 24 Geo III c. 56 now went further. Enacted only four months after the mutiny at Torbay of George Moore's second cargo of convicts bound for America, the parliament now required additional security. In a word order in the legislation that suggested a degree of urgency, security was now required from:

every Person or Persons to whom any such Offender or Offenders shall be transferred as aforesaid, shall, before any of them shall be delivered over to him or them to be transported, give Security that he or they will transport, or cause to be transported effectually.<sup>20</sup>

This provision required the master and the mate of the transport ships also to provide security. Only then did the legislation repeat the 1717 formula for the transportation contractor to also provide security.<sup>21</sup>

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<sup>19</sup> 24 Geo III c. 56, Section XIII. This section also repeated the provisions of an earlier section with respect to offenders found at large in Great Britain and rewards for their successful prosecution.

<sup>20</sup> Section II.

<sup>21</sup> Section III. These requirements were played out as part of the processes to send the First Fleet to Botany Bay.

Section III restated the process whereby courts contracted with contractors to carry out the process of transportation notwithstanding the probable expectation that the government itself would step in with some sort of organised shipping arrangement once a destination had been determined. The powers of a sheriff and gaoler were extended to the transportation contractor and his agents, and these powers crossed county borders.<sup>22</sup> As part of an obvious and growing concern about the role of transportation in Great Britain, the costs of ‘executing’ the legislation were, in future, to be put before the parliament on an annual basis.<sup>23</sup>

The provisions of the old hulks legislation of 1779 were repealed and re-enacted. The king, or justices empowered by the king, could send offenders awaiting transportation to ‘Places of Confinement ... on board any Ship or Vessel in the River Thames’. The overseer was similarly granted the powers of a sheriff or gaoler, and the power to discipline misbehaviour. Sworn certificates were to be lodged with the Court of King’s Bench at the commencement of each law term setting out the costs of running the hulk and the state of the offenders incarcerated there.<sup>24</sup> In a retreat from the position of the reformists and Charles James Fox earlier in the year, the right of an offender in the hulks to be paid half the value of any services he provided or to volunteer for labour was no longer included. The custodial power of the overseer extended to the power, ‘to keep him [the offender] to labour at such places, and under such directions, limitations, and restrictions’ as the king directed.<sup>25</sup> Finally, the new act was to continue in effect only until 1 June 1787. The operation of 19 Geo III c. 74 (the Penitentiary Act) of 1779 was also

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<sup>22</sup> 24 Geo III c. 56, Section IV.

<sup>23</sup> 24 Geo III c. 56, Section XIV.

<sup>24</sup> 24 Geo III c. 56, Sections VI, VII, VIII, X, and XIII.

<sup>25</sup> Section VIII.



extended to the same date, despite the fact the no penitentiary had been constructed and there were no plans for any construction to commence.

Discussions in Britain about the revitalisation of transportation continued, based on West African options. Rumours about the government's intentions circulated and were raised in the House of Commons by Lord Beauchamp on 11 April 1785.<sup>26</sup> A vigorous debate followed and, on 20 April, the House appointed a further committee to inquire into 'what Proceeding have been had in the Execution of' the 1784 act 24 Geo III c. 56. The Committee, under the chairmanship of Lord Beauchamp, was given wide power to identify any further necessary measures 'to carry the Act into Effect' and became the House repository for the consideration of information on all aspects to the management of offenders detained in the hulks.<sup>27</sup> These inquiries generated two reports into the resumption of transportation, one dated 9 May 1785 and the second dated 28 July 1785. Both reports addressed the practicability of the resumption of transportation and the identification of a suitable site to which offenders could be sent.<sup>28</sup>

Lord Beauchamp's first report canvassed the evidence presented to the committee as to the suitability of a settlement at Lemane Island, some 400 miles up the Gambia River. The Tory Pitt government's support for this plan was expressed through Evan Nepean, the Under-Secretary of State for the Home Department. Other witnesses and, eventually, the Committee itself, were critical of the plan.

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<sup>26</sup> Oldham, *Britain's Convicts to the Colonies*, p. 99.

<sup>27</sup> *JHC*, Volume 40 (1784-1785). For the debate on 20 April 1785, see p. 870, and on 22 April, see p. 875. On 5 May 1785 the Committee was authorised to report to the Commons 'from time to time'. See p. 937.

<sup>28</sup> The first Beauchamp report, presented on 5 May 1785, is set out in *JHC*, Volume 40, pp. 954-60. The second was presented on 28 July 1785 and is set out in *JHC*, Volume 40, pp. 1161-1164.

While the Committee was assured that a new, self-governing, convict colony would be capable of taking sufficient convicts annually; critics of the plan raised strong objections. The climate was unsuitable for Europeans, particularly women. Security would be impossible to maintain and Britain would be attacked for the damage and injury that escaped offenders might inflict upon others.<sup>29</sup> The evidence before the Committee and its criticism of the Lemane Island plan simply exacerbated the government's predicament. Prisoners were being held in county or London gaols awaiting transportation leading to the hiring of yet more hulks through the auspices of Duncan Campbell. At the same time judges and justices were sentencing offenders to transportation to Africa or to places to be determined by the king in council.

Lord Beauchamp's second report of 28 May 1785 continued the inquiry into a suitable destination to which transported offenders might be sent, in particular Das Voltas on the south-west African coast was examined.<sup>30</sup> The committee ignored a caution from Secretary of State Sydney, that current government formulation on the matter was 'unworthy of the attention of the Committee', the committee persisted. The importance of the second Beauchamp report lies in the views of the Committee on the general nature of transportation and the somewhat idealised picture the Committee painted of the 'old system to America [which] ... answered every good Purpose which could be expected of it.'<sup>31</sup> The Committee, nevertheless, went on to comment on the nature of any settlement that might be

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<sup>29</sup> Lemane Island appeared, according to Nepean, to be capable of taking 200 criminals 'too dangerous to remain in this country'. This would have been insufficient to clear the backlog of offenders presently in British gaols, and would not meet the continual flow of new offenders into the gaols. *JHC*, Volume 40 (1784-1785), p. 955.

<sup>30</sup> *JHC*, Volume 40 (1784-1785), p. 1161.

<sup>31</sup> *JHC*, Volume 40 (1784-1785), pp. 1161-2.

established, taking a stand against the idea of a self-governing community along the lines contemplated at Lemane Island, arguing instead for a settlement for loyalist American colonists in the following terms:

That many *American* Families are desirous of settling in any healthy Part of the Globe where they can rely on the Protection of *British* government; and that they will readily resort to the Coast in Question, under proper Encouragement to do so <sup>32</sup>

Here the Committee painted a preferred societal model by which the Settlers would, in part, at least, oversee the transported offenders, in terms which would have been familiar to Sir Thomas Smith in 1582: ‘that Settlers of the Description will be very Instrumental in keeping the Convicts in due Subordination; and that their Labour may be assigned over to them, under proper Restrictions’.<sup>33</sup> Such arrangements would, in the opinion of the Committee, have had the combined benefit of developing a flourishing system of emigration (in preference to the current rate of immigration to the United States of America), while ‘annually’ relieving the ‘Gaols of this Kingdom.’<sup>34</sup> The Committee concluded on a positive note, but cautioned:

On considering the Whole of the Subject, the Committee are of Opinion, That if the legislature persists in the System of Transporting Criminals to *Africa*, the Scheme now suggested is the Only one which appears to them of a practicable Nature; yet, as it will not answer the Purpose of annual Transportation, unless it becomes a numerous and flourishing Colony, which will require for many Years the fostering Hand of the Mother Country, the Committee recommend the Adoption of it, so far only as the Commercial and Political Benefits of a Settlement on the South West Coast of *Africa* may be deemed of sufficient Consequence to warrant the Expence inseparable from such an Undertaking, at the same Time that it restores Energy to the Execution of the Law, and contributes to the interior Police of this Kingdom.<sup>35</sup>

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<sup>32</sup> *JHC*, Volume 40 (1784-1785), p. 1164.

<sup>33</sup> *Ibid.* This model was eventually adopted in New South Wales.

<sup>34</sup> *JHC*, Volume 40 (1784-1785), p. 1164.

<sup>35</sup> *JHC*, Volume 40 (1784-1785), p. 1164.

In the final analysis, the Committee failed to draw any conclusions about the suitability of Das Voltas, observing (with reference to Lemane Island or Das Voltas) that, 'His Majesty is fully authorized, by Power derived under the Act of the last Session, to adopt either or both of those places if He should be so advised'.<sup>36</sup> The selection of Das Voltas by the government rested upon a site investigation undertaken by the government. Opposition to Das Voltas from officers of the East India Company had been insufficient to persuade the government against the site.<sup>37</sup> The sloop *Nautilus* was despatched to the south-west African coast in July 1785 to prepare a definitive report. In the meanwhile the Home Office, in anticipation of a settlement being founded, called for tenders for the transportation of offenders to South-West Africa in June 1786.<sup>38</sup> When the *Nautilus* returned in August 1786 to report that the designated area was an uninhabitable desert, the plan to settle Das Voltas was abandoned. On 18 August 1786 Lord Sydney advised the Treasury that arrangements were, instead, to be put in place to send a fleet of vessels to Botany Bay.<sup>39</sup>

Before examining the implementation of the Botany Bay decision, it is useful to look again at the regime that was in place in August 1786 authorising

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<sup>36</sup> *JHC*, Volume 40 (1784-1785), p. 1162.

<sup>37</sup> Alexander Dalrymple, hydrographer to the East India Company published a 'Serious Admonition' to this effect. See Alexander Dalrymple and George Mackaness, *Alexander Dalrymple's "a Serious Admonition to the Public on the Intended Thief Colony of Botany Bay"; with a Memoir Australian Historical Monographs* (Sydney, 1979). Dalrymple warned that the distance to Botany Bay was so great that an offender sentenced to transportation for seven years would, effectively, be serving a sentence for life, p. 29.

<sup>38</sup> Oldham, *Britain's Convicts to the Colonies*, p. 107. See also Mollie Gillen's, 'His Majesty's Mercy: Circumstances of the First Fleet', *The Push, A Journal of Early Australian Social History*, 29 (1991), pp. 47-109, at pp. 98-102.

<sup>39</sup> Alan Frost, *Botany Bay: The Real Story* (Melbourne, 2011), p. 216. The exact date when the decision was made is unclear. Alan Frost, writing in 2011, concluded that the decision was made by cabinet on 19 August 1786. Under Secretary Nepean prepared a letter to Treasury on 21 August to go under the signature of his superior, Lord Sydney. Sydney's letter was backdated by Nepean to 18 August in order to circumvent a Treasury summer recess. The text of Sydney's letter is set out in *Historical Records of New South Wales* (hereinafter *HRNSW*), Volume 1, Part 2, (Sydney, 1892), pp. 14-20.

transportation and to recognise how much it differed from the position before the cessation of transportation to America in 1775. As already mentioned the legislative mechanism then in place was the act of 1784, 24 Geo III c. 56, applicable to England and Wales. The circumstances of legislation authorising transportation from Scotland is considered separately in Chapter 6. The 1784 legislation was, in essence, a restatement of arrangements that had covered the transportation of offenders to America between 1717 and 1775 and had been enacted without any specific application to circumstances appropriate to the transportation of offenders to Botany Bay.<sup>40</sup> These pre-1775 mechanisms had been altered in three particulars, each of which became relevant in the period leading up to the implementation of the Botany Bay decision.

First, from as early as 1779, the impossibility of transporting offenders to America had been accommodated in the legislative formula contemplating transportation ‘to any Parts beyond the Seas, whether the same be situated in America, or elsewhere’.<sup>41</sup> In 1784, against active consideration by both the government and the parliament of alternative destinations to which transported offenders might be sent, a revised bifurcated formula was devised. Offenders sentenced to transportation were to be, ‘transported beyond the seas’.<sup>42</sup> A separate process was then put in place to determine the destination. The King in council was ‘to declare and appoint to what place or places, part or parts beyond the seas ... such felons or other offenders shall be conveyed or transported’.<sup>43</sup> Interestingly, this provision was stated with reference to those offenders under sentence of transportation, but

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<sup>40</sup> As indicated above, a range of possible destinations had been under consideration, mostly focussing on transportation to Africa.

<sup>41</sup> 1779 statute, 19 Geo III, c. 74, section I.

<sup>42</sup> 24 Geo III c. 56, section I.

<sup>43</sup> Section I, 24 Geo III c. 56.

was not repeated with reference to those proceeding to transportation pursuant to a conditional pardon. This latter group, in a much less descriptive process, were to be transferred ‘to any person or persons who shall contract for the due performance of such transportation’. The unstated implication was that the contractor would transport the offender to the place designated by the King in council with respect to those under sentence of transportation. As described in Chapter 2, in 1603 James I had issued a proclamation designating the destinations to which rogues, vagabonds, and sturdy beggars might be banished. That precedent, of a single document setting destinations for transportation, was not followed in the years after 1784. Instead, as will be considered below, each subsequent determination of transportation required a separate order in council designating a destination for transportation until 1824 when alternative arrangements were put in place. For the purposes of this thesis, however, the resulting records of the order in council provide an invaluable insight into subsequent transportation processes.

Second, another further aspect of the use of orders in council needs to be noted because it offers another point of both similarity between transportations after 1784 and those during the period 1717 to 1775. As mentioned above, the statute 24 Geo III c. 56 had made slightly different arrangements with respect to the destination for offenders under sentence of transportation (usually for seven years for an offence warranting such a penalty) and those under order of transportation pursuant to a conditional pardon. While the legislation contemplated different processes, the administrative practice implemented in connection with the formation of the First Fleet in the period leading up to May 1787 made no such

distinction. The orders in council simply listed the names of offender and the terms for which they were to be transported. Any point of difference as to the reason for transportation between one offender and another was lost.<sup>44</sup>

Supplementary information, such as the commencement date or the date of completion of transportation, if any, was omitted. As mentioned by the American historian Fred Schmidt with respect to transported convicts arriving in the Chesapeake during the 1730s to 1750s, any distinction between sentences and orders of transportation did not survive the process of transportation itself.<sup>45</sup> This was to have interesting repercussions when the overall status of transported offenders in Australia is examined closely.

The third alteration to the practice of transporting offenders from Britain pursuant to the 1784 legislation which differed from that before 1775 involved the use of contractors. While the legislative format remained the same, in practice there was a point of practical difference that was to relate directly to the relevance of the formula 'property in the service of the offender'. The legislative machinery of 1784 reiterated that of 1717 and 1719. Courts with jurisdiction to sentence or order offenders to be transported were also authorised to enter into contracts for the transportation of those offenders.<sup>46</sup> In practice, however, a parallel process also developed. On 18 August 1786 Lord Sydney had written to the Commissioners of the Treasury to set in place arrangements to transport offenders

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<sup>44</sup> The first of a number of orders-in-council to meet the requirements of the First Fleet was passed on 6 December 1786 and are set out in the Privy Council Register PC2/131 pp. 492-505, The National Archives (hereinafter TNA).

<sup>45</sup> FH Schmidt, "British Convict Servant Labor in Colonial Virginia". PhD Thesis, William and Mary College, 1972, pp. 72-82.

<sup>46</sup> See, for example, Section III of 25 Geo III c. 56.

to Botany Bay.<sup>47</sup> On 26 August 1786 the Treasury passed responsibility for the raising of the necessary ships to the Commissioners of the Navy (the Navy Board) and on 29 August the Navy Board invited tenders for the supply of ships.<sup>48</sup> Responsibility for the non-naval aspects of the project remained with the Home Department and Under-Secretary Nepean. The Navy Board selected the shipbroker William Richards Jnr. to fill the contract, which was signed on 12 September 1786. The Commissioners of the Navy nominated vessels for acceptance by the Navy Board during the following weeks.<sup>49</sup> In effect, two sets of transportation contracts came into being.

The provisions of the transportation statute of 1784 went further than just requiring contracts. Again, in line with the arrangements of the 1719 legislation, the shipping contractor was also required to give ‘proper security’.<sup>50</sup> The security went both to the proper delivery at the place appointed, but also to delivery ‘in such manner as aforesaid’, meaning compliance with directions as to security and protection. The security required evidence of delivery. However, the need for security appears, initially, not to have been uppermost in the minds of the various officials arranging for the departure of the First Fleet. Not until 9 December 1786 did Under-Secretary Nepean write to Sir Charles Middleton of the Navy Board reminding Middleton of the need for the Board to arrange for the completion of the relevant (security) bonds and contracts.<sup>51</sup> Middleton responded on 11

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<sup>47</sup> 1 *HRNSW*, Volume 1, Part 2, pp. 14-5.

<sup>48</sup> Oldham, *Britain's Convicts to the Colonies*, p. 125.

<sup>49</sup> Oldham, *Britain's Convicts to the Colonies*, p. 123. Oldham notes that a copy of the contract itself has not been found but Oldham surmised its form and contents as being similar to that used by Jonathan Forward in 1717. A more useful precedent may be that of 7 April 1763 mentioned above. Treasury Entry Books 1762-1765, file T54/39, pp. 228-9 and 229-30, TNA.

<sup>50</sup> See Section II, 24 Geo III c. 56.

<sup>51</sup> ‘I hope it has occur’d to you in your engagements for the transports that the owners, as well as the masters and mates, must enter into the bonds which the Acts of Parliament require for the safe



December 1786, pointing out lack of prior experience with the transportation of convicts, complaining that better advance notice might have been helpful (and saved public money), but pointing out that transportation to America had involved the contractors being paid an allowance and obtaining ‘an interest in them’ (the convicts).<sup>52</sup> Middleton queried whether, in the circumstances of convicts being transported to New South Wales in return for ‘freight and victualling’ and the risks to the ships themselves, how the shipping contractor’s security might be determined. Middleton appears to have concluded, on 11 December 1786, that the shipowner would acquire ‘an interest’ in the convicts, but that it was of no realisable value.

Notwithstanding the Navy Board’s contract with William Richards, on 16 December 1786 Lord Sydney wrote to the law officers (Attorney-General Richard Pepper Arden, and Solicitor-General Archibald Macdonald) referring to the parallel contracting practice. The circumstances of Sydney’s letter are not entirely clear. He had been approached by some clerks of assizes. The clerks had queried whether it was ‘absolutely necessary’ for a contract for transportation to be in place signed by two of their justices. The reason for the clerks’ inquiry related to apparent prosecutions for offenders escaping custody while under orders of transportation. Was it necessary, the clerk’s inquired, for there to be a contract in place for transportation in order for an offender to be prosecuted for being at large? Sydney drew to the attention of the law officers the existence of the

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custody of the convicts whilst on board the transports. If that has not been done new difficulties will arise, for the courts will not vest them with the custody of the convicts without it.’ Set out in *HRNSW*, Volume 1, Part 2, (Sydney, 1892) p. 31. See also Oldham, *Britain's Convicts to the Colonies*, p. 133.

<sup>52</sup> See Sir Charles Middleton to Under Secretary Nepean, *HRNSW*, Volume 1, Part 2, (Sydney, 1892), pp. 35-6, at 36.

contract between the Commissioners for the Navy and the contractor and shipowner, William Richards.<sup>53</sup> In a brief reply dated 19 December 1786, the Law Officers recited the provisions of the legislation and indicated the need for the justices also to sign contracts for transportation.<sup>54</sup>

Whether Middleton's observations raised questions in the Home Department or whether the advice of the Law Officers drew attention to an apparent omission in process is not entirely clear. Nepean would probably have been aware that the 1784 legislation, like that of 1717, gave the transportation contractor property in the service of the transported offenders. Middleton's observations, however, must have triggered some otherwise unrecorded concern about the formalities of transportation. With the first four orders in council authorising the transportation of convicts to Botany Bay already in place, on 1 January 1787 Under-Secretary Nepean wrote to Thomas Shelton at the Old Bailey requesting Shelton to 'get the bonds and contracts (if necessary) executed with as little delay as may be.'<sup>55</sup>

Thomas Shelton was the Sessions Clerk at the Old Bailey. His exact role in the preparation of the bonds and contracts for transportation is difficult to assess accurately, but he remained a stakeholder in the documentation of most subsequent transportation arrangements to New South Wales and Van Diemen's Land until 1824 as considered below.<sup>56</sup> The accounts produced by Thomas

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<sup>53</sup> Home Office Letter Book HO 49/1 pp. 274-5, TNA

<sup>54</sup> Home Office Legal Adviser's papers HO 48/1A, p. 858, TNA.

<sup>55</sup> See Under Secretary Nepean to Mr. Shelton. *HRNSW*, Volume 1, Part 2 (Sydney, 1892), pp. 42-3. And see Oldham, *Britain's Convicts to the Colonies*, p. 133.

<sup>56</sup> Shelton has been the subject of at least two substantial examinations. In 1979 Clive Emsley described Shelton as a onetime industrial spy for the British government, who was rewarded for previous endeavours on behalf of the government with the financially rewarding post of the Sessions Clerk at the Old Bailey. Clive Emsley, "The Home Office and Its Sources of Information and Investigation 1791-1801," *The English Historical Review*, 94 (1979), pp. 532-62. Shelton held the position until his death in 1829, although, as will be demonstrated below, his involvement with the formation of the transportation contracts and documentation proved not to be lucrative because

Shelton for his later work for the Home Department provide another insight to the transportation process. What seems to have been omitted in the exchanges between Nepean, Middleton, and Shelton, is any reference to the processes by which the contractor's proprietary interest in the convicts would be assigned to the colonial governor.

Despite the narrow ground of Lord Sydney's inquiry, the process recommended by the Law Officers seems to have been played out across England in the following weeks, possibly at the hands of Thomas Shelton, although the evidence for his involvement in the documentation for the First Fleet is very limited. On 27 January 1787 two justices of the peace from Kingston-upon-Thames entered into a contract with William Richards for the transportation of Mary Mitchell.<sup>57</sup> The contract was more in accordance with the legislative requirements as stated by the law officers but was otherwise redundant. The process was repeated with respect to Kingston-upon-Thames shortly before the departure of the First Fleet. On 10 March 1787 Under-Secretary Nepean wrote to the clerk at Kingston-upon-Thames requesting two justices to complete the contract for the transportation of two offenders, James Squires and James Bloodworth. On this occasion there was a minor change in procedure and Nepean indicated that the justices were to sign

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he never sought payment from the government. The second examination has been made in the extensive research carried out by Dan Byrnes. Shelton's activities appear throughout Byrnes's works, in particular; <http://www.merchantnetworks.com.au/timelines/pathways1.htm>; and in <http://www.danbyrnes.com.au/blackheath/thebc29.htm> Byrnes notes the centrality of Shelton's subsequent activities. Shelton appeared before the House of Commons and its committees to give evidence on the administration of justice at the Old Bailey. His evidence did not touch on the issues considered in this thesis. See *JHC*, Volume 68 (1812-1813), p. 483, and the *Report from the Select Committee on the State of Gaols, &c.* House of Commons Parliamentary Papers, 1819 (579), pp. 290-293.

<sup>57</sup> County of Surrey Archive, Kingston-upon-Thames, Convict transportation orders, KA 2/4/6. And see Alan Frost, *The First Fleet: The Real Story* (Melbourne, 2011), p. 122. Frost expected there to be a contract for the transportation for each convict in the First Fleet. As is demonstrated below, there is probably an explanation for this which involved the use of warrants instead of contracts with the justices.

contracts both with the contractor, William Richards, but also with Francis Walker, the master of the *Friendship*, who was to transport the offenders to Botany Bay.<sup>58</sup>

Within the context of this thesis, the implementation of the Botany Bay decision involved a number of procedural steps. A fleet of ships needed to be assembled, to carry the requisite number of convicts, together with their supplies, food, and clothing. It was necessary to give some form of legal structure to Britain's earlier claim to the territory of New South Wales.<sup>59</sup> A governor for the new settlement had to be appointed and commissioned. He needed to be issued with the necessary instructions. Finally, the new settlement would need some formal structures whereby the legal, judicial, and administrative roles of the various colonial officers could be authorised.<sup>60</sup>

In October 1786 Captain Arthur Phillip of the Royal Navy was commissioned to take up the role of Governor of New South Wales once he reached Botany Bay. A first commission was issued on 12 October 1786.<sup>61</sup> This commission was brief. It defined the territorial extent of New South Wales, appointed Phillip governor, and required him to 'observe and follow such orders and direction for time to time as you shall receive from us'. Phillip's first stated obligations were military and required him to act in accordance with the 'rules and discipline of war'. Only then did the commission require Phillip to obey any instruction given to him by

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<sup>58</sup> See the Home Office Criminal Book HO 13/5, p. 77. TNA.

<sup>59</sup> For a detailed examination of this issue and the options available to the British government see Alan Atkinson, "The First Plans for Governing New South Wales, 1786-87," *Australian Historical Studies*, 24 (1990), pp. 22-40. In addition see Ged Martin, ed., *The Founding of Australia: The Argument About Australia's Origin* (Sydney, 1978).

<sup>60</sup> Alan Atkinson, *The Europeans in Australia: A History* (Oxford, 1997), pp. 55, 58.

<sup>61</sup> The text of the first commission is set out 1 *HRA* 1, pp. 1-2. O'Brien wrongly dates this commission as having been issued on 12 November 1786. See Eris O'Brien, *The Foundation of Australia (1786-1800)* (Westport, Connecticut, 1937), p. 134.

officers of the government.<sup>62</sup> A second commission was issued on 2 April 1787 shortly before the First Fleet left Portsmouth.<sup>63</sup> This commission was different. Military directions were omitted and further ‘powers instructions and authorities’ were itemised and could be added to by further instructions from the Privy Council.<sup>64</sup> Phillip’s role was raised in status from Governor to Captain-General and Governor in Chief. The commission went on to itemise the framework that was to be put in place to administer the colony, referred to more than once in the alternative as ‘plantation’. Eris O’Brien observed that Phillip’s second commission ‘more clearly showed that Phillip was directed to act as a colonial governor as well as a gaoler.’<sup>65</sup> But there is no evidence of this from the documentation.

The decision of August 1786 to resume transportation and to designate Botany Bay in New South Wales as the destination required the participation of the King in council. On 1 December 1786, Lord Sydney wrote to the Lord President of the Council sending lists of 750 convicts ‘now in Goals (sic) and other places of Confinement under Sentence or Order of Transportation’ and requesting that the ‘His Majesty by and with the advice of His Privy Council’ should ‘declare and appoint to what Place or Places, Part or Parts beyond the Seas’ to which the offenders would be transported.<sup>66</sup> Two orders in council were issued on 6

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<sup>62</sup> These included the High Treasurer – the title used by the Prime Minister (Pitt) as First Lord of the Treasury – and ‘one of our Principal Secretaries of State’. Instructions from the Secretary of State (initially from the Home Department) were to be the device by which the government of the Colony was maintained under the jurisdiction of the British government.

<sup>63</sup> The text of the second commission is set out in 1 *HRA* 1. pp. 2-8.

<sup>64</sup> 1 *HRA* 1, pp. 2-3. Military powers did not disappear completely. Powers to levy an army, apply martial law, and raise fortifications were included. See p. 5.

<sup>65</sup> O’Brien, *The Foundation of Australia (1786-1800)*, p. 135.

<sup>66</sup> Home Office Domestic Letter Book, HO 43/2, pp. 180-1, TNA.

December 1786, two more followed on 22 December.<sup>67</sup> Two more were issued on 12 February 1787 and two final orders were issued on 20 April 1787.<sup>68</sup>

The assembly of the convicts for the First Fleet started with a writ dated 23 January 1787 issued by Lord Sydney to Duncan Campbell to deliver convicts presently held in the hulks on the Thames to William Richards (described as ship broker) and to Duncan Sinclair, the master of the *Alexander*, for their transportation to New South Wales.<sup>69</sup> Two consequences flowed from the gathering of the convicts for transportation: first, the process of moving offenders to Portsmouth was implemented by the use of writs to move them around England and to deliver them to the overseers of the hulks. Second, the use of writs explains the absence of contracts, which worried Australian historian Alan Frost.<sup>70</sup> The position would appear to be that writs were used to move convicts already in custody in the hulks; contracts were needed to move those who were still in local gaols.

The circumstances surrounding the foundation of New South Wales as a British colony are well known.<sup>71</sup> The First Fleet sailed from Portsmouth on 13 May 1787. The fleet comprised two naval vessels, three support transport vessels, and six convict transports. The convict transports had been supplied to the Admiralty by

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<sup>67</sup> For 6 December 1786 see Privy Council register, PC 2/131 pp. 492-505, and pp. 505-519, TNA. For 22 December 1786 PC 2/131, pp. 505-19, and pp. 540-43.

<sup>68</sup> For 12 February 1787 see PC 2/132, pp. 36-39, and pp. 39-41, and for 20 April 1787 see PC 2/132 pp. 158-60 and pp. 160-163.

<sup>69</sup> Home Office Criminal Book HO 13/5, pp. 1-6, TNA. Further writs followed: 20 January 1787 – HO 13/5, pp. 31-2; 24 February 1787 – HO 13/5 pp. 65-8; 5 March 1787 – HO 13/5 pp. 74-7; 10 March 1787 – HO 13/5 p. 77 and 4 April 1787 – HO 13/5 p. 129. The process continued even after the departure of the First Fleet. On 25 May 1787 a further writ was issued – HO 13/5 p. 201.

<sup>70</sup> Frost, *The First Fleet: The Real Story*, p. 122.

<sup>71</sup> In this thesis, the debate as to whether the decision to settle New South Wales as a place to send convicts or as an outpost of a trading empire is sufficiently considered in the literature as to warrant no further examination here.

the transportation contractor William Richards Jnr.<sup>72</sup> The convict transports carried 759 convicts (568 male and 191 female).<sup>73</sup> In accordance with the provisions of the prevailing transportation legislation, William Richards held the property in the services of the convicts. After leaving Portsmouth, the Fleet visited Rio de Janeiro and Cape Town before arriving at Botany Bay on 18 and 20 January 1788.<sup>74</sup> Finding Botany Bay and its immediate hinterland unsatisfactory, Governor Phillip relocated the settlement to Port Jackson where 1,067 men, women, and children disembarked at Sydney Cove on 26 January 1788. Of these, 732 were convicts who thus comprised approximately 68% of the settlement population.<sup>75</sup> On 7 February the formalities associated with the foundation of the colony were conducted, Phillip's first and second commissions were read out, together with the text of the legislation constituting the court of civil jurisdiction (27 Geo III c. 2) and the letters patent of 5 May 1787 constituting the vice-admiralty court.<sup>76</sup>

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<sup>72</sup> This information is drawn from Chapter 7 of Charles Bateson's, *The Convict Ships 1789-1868* (Glasgow, 1969), pp. 94-119. Two naval vessels were *HMS Supply* and *HMS Sirius*. The three transport vessels were; *Golden Grove*, *Fishburn*, and *Borrowdale*. The six convict transports were: *Alexander*, *Charlotte*, *Friendship*, *Lady Penrhyn*, *Prince of Wales*, and *Scarborough*.

<sup>73</sup> These numbers vary depending upon the source. Both Governor Phillip and Judge Advocate David Collins maintained records. In 1989 the English historian Mollie Gillen attempted to rationalise the sometimes conflicting data. Mollie Gillen and Yvonne Browning, *The Founders of Australia: A Biographical Dictionary of the First Fleet* (Sydney, 1989), p. 445. Some twenty-seven convicts died during the voyage. Different numbers have been used as the basis of the University of Wollongong First Fleet Database which is utilised below. This assumed that 750 convicts had been disembarked at Port Jackson.

<sup>74</sup> Captain Phillip had decided in Cape Town to take the fastest vessel, the *Supply*, to proceed to Botany Bay. He arrived on 18 January 1788, while the remainder of the fleet arrived two days later.

<sup>75</sup> Gillen and Browning, *The Founders of Australia: A Biographical Dictionary of the First Fleet*, p. 445. The University of Wollongong First Fleet database calculated that out of 780 convicts, 536 (68%) had been sentenced to terms of transportation, while 244 (32%) were capital convicts who had been conditionally pardoned and ordered to transportation. See <http://firstfleet.uow.edu.au/search.html> (accessed: 12 June 2014).

<sup>76</sup> C.H.M. Clark, *A History of Australia*, volume I (Melbourne, 1962), p. 88. The circumstances of the first few days of the new colony are canvassed by Clark between pp. 85-9. At p. 87, footnote 72, Clark lists a series of articles written in the 1960s which canvass the details of the early days of the colony in greater detail.

Yet, despite the precise planning for the Fleet's voyage carried out in London by officers of the Home Department, the Admiralty, and the Navy Board, some matters had not been sufficiently attended to.<sup>77</sup> Two such matters were noted by Wilfrid Oldham. One was the inadequate supply of undergarments for the female convicts, while the other, of somewhat greater importance, was the failure to load sufficient ammunition for the marines guarding the convicts. These deficiencies prompted Wilfred Oldham to characterise the situation as 'Gilbertian'.<sup>78</sup>

Unmentioned by Oldham, and yet more Gilbertian within the framework of this thesis, was another oversight, which would have transferred the servitude of the convicts to Governor Phillip: the single act that gave purpose to the First Fleet having been sent to Botany Bay in the first place. On 9 July 1788, Phillip reported to Under-Secretary Nepean from Sydney:

The masters of the transports having left with the agents the bonds and whatever papers they received that related to the convicts, I have no account of the time for which the convicts are sentenced, or the dates of their convictions some of them, by their own account, have little more than a year to remain, and, I am told, will apply for permission to return to England, or to go to India, in such ships as may be willing to receive them.<sup>79</sup>

Phillip articulated the problem of the absence of the 'bonds and whatever papers they received that relate to the convicts' as an issue of sentencing, not an absence

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<sup>77</sup> The preparedness, or otherwise, of the First Fleet has been the subject of much comment. Criticisms take different directions according to the discipline of the author. [ ] is critical of the planning which left the new colony supplied with too few skilled tradesmen after the transport ships departed Port Jackson. HV Evatt, writing in 1938, thought the legal constructs of aspects of the colony, particularly the formation of the civil and criminal courts, were 'rushed'. Evatt, "The Legal Foundations of New South Wales", *Australian Law Journal*, 11 (1938), p. 422. Sir Victor Windeyer, writing in 1962, took a different view, stating with respect to the legal instruments: 'Their language was precise, their purpose plain.' Windeyer, "A Birthright and an Inheritance: The Establishment of the Rule of Law in Australia", *Tasmania University Law Review*, 1 (1958), p. 651. It is probable that Evatt and Windeyer would have been unaware of Oldham's unpublished thesis of 1932 at the time each of them drew their conclusions.

<sup>78</sup> Oldham, *Britain's Convicts to the Colonies*, p. 140.

<sup>79</sup> 1 *HRA* 1, p. 57.



of having received the servitude of the convicts. This problem was real enough and can be readily quantified.

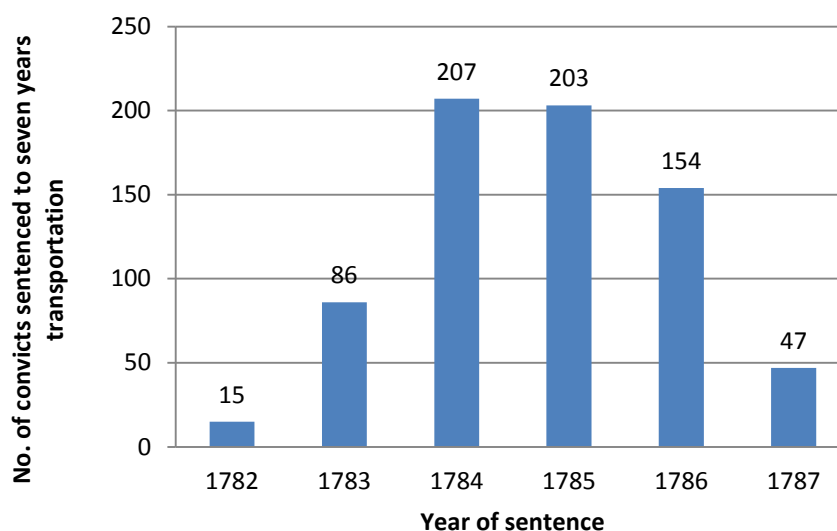
An analysis of the records of the First Fleet by the University of Wollongong First Fleet database indicates that the overwhelming majority of the convicts (712 out of 750, i.e. nearly 95%) had been sentenced to seven years transportation. The distribution is shown in Figure 1.

**Figure 1: Length of sentences of First Fleet convicts**



Source: Uni. of Wollongong First Fleet database

More importantly, of the seven years sentences handed down to the 712 convicts, many of these were of long standing. This distribution is shown in Figure 2.

**Figure 2: Year of sentencing of seven-year convicts in the First Fleet**

Source: Uni. of Wollongong First Fleet Database

An examination of the records of the fifteen convicts (2 women and 13 men) sentenced to transportation for seven years during 1782 show that three had been sentenced in March 1782; one on 6 March 1782 and two on 18 March 1782.<sup>80</sup> These convicts could reasonably have expected to have been free of any sentence by 6 March and 18 March 1789 respectively; that is, less than thirteen months after their arrival in New South Wales. These calculations confirm the observations of some of the convicts referred to by Phillip in his letter to Nepean of 9 July 1788 mentioned above.<sup>81</sup> Further pleas for advice on the matter from London of 15 April and 10 July 1790 merely accentuated the developing problem. On 15 April 1790 Phillip reported that he now had ‘a great number’ of expirees ‘very few of whom are desirous of becoming settlers in this country.’<sup>82</sup> From the University of Wollongong First Fleet database it can be calculated that by the time of this letter (April 1790) some 100 or so expirees would have been in this

<sup>80</sup> Details of individual sentences were sourced from the Queensland State Library convict database website: <http://www.convictrecords.com.au>.

<sup>81</sup> Phillip to Nepean, 1 *HRA* 1, p. 57.

<sup>82</sup> Phillip to Nepean, 15 April 1790, 1 *HRA* 1, p. 171.

position. Having received no response from London for the documentation with respect to the First Fleet, on 10 July 1790 Phillip wrote again to Nepean. Now in receipt of the indentures and assignments for the three vessels of the Second Fleet, Phillip restated his earlier complaint, but now underscored the problem by pointing out that some thirty expirees were now demanding return to Britain, adding, ‘and their numbers will increase, as well as their discontent.’<sup>83</sup> A similar letter was sent to London in March 1791, this time addressed to Lord Grenville, the new Secretary of State, which, while restating his dilemma, shifted the emphasis. No longer concerned only with knowing the expiry dates of the sentences of the convicts of the First Fleet, the issue of expirees remaining in the colony took on greater importance. Articulating what was to become a central response, Phillip advised Grenville:

To compel these people to remain may be attended with unpleasant consequences; for they must be made to work, if fed from the publick store; and if permitted to be their own masters, they must rob, for they have no other way to support themselves.

He went on:

The language they hold is, that the sentence of the law has been carried into execution, that they are free men, and wish to return. I have no means of knowing when the sentences of any of the convicts expire who came out in the first ships. Many of these people would find a passage to China in the ships which stop here, if those ships were permitted to receive them on board; but here are many, whose sentences are said to be expired, that no ship would receive, aged and infirm.<sup>84</sup>

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<sup>83</sup> Phillip to Nepean, 1 *HRA* 1, p. 187. The three vessels of the Second Fleet arrived two weeks before the letter was written: the *Surprise* on 26 June 1790, and the *Neptune* and *Scarborough* on 28 June 1790. Bateson, *The Convict Ships 1789-1868*, p. 126.

<sup>84</sup> Phillip to Grenville, 5 March 1791, 1 *HRA* 1, p. 251

On 9 July 1791, three years after it was first requested, the information about the sentences for the First Fleet convicts arrived in Sydney.<sup>85</sup> This comprised the lists now held in the New South Wales State Archives, but no assignment documentation ever seems to have been delivered.<sup>86</sup> The conclusion reached here is that the documentation for the assignment of the services of the convicts was never drawn up. Its inclusion in Phillip's Instructions, issued in April 1787, and the absence of any mention in the communications between Nepean, Middleton, and Shelton may have meant that it was too late to prepare the relevant documentation. As the events below demonstrate, it took one more cargo of convicts to be sent to New South Wales before appropriate documentation became evident.

The problem faced by Phillip with respect to expiring sentences and his response to the issue of expirees returning to Great Britain are cited here as further evidence of the poor planning with respect to all aspects of the assignment of the servitude of the convicts. If, as is suggested, the process of servitude rested upon the assignment by William Richards of his statutory rights to the service of the First Fleet convicts, then it follows that none of those convicts were ever in servitude in New South Wales. The practicalities of the actual assignment (or not) of the services of the convicts was process dependent. Since the relevant documentation for the assignment of the convicts of the First Fleet, if it ever existed, never reached New South Wales in 1788, it is difficult to be precise about

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<sup>85</sup> Phillip to Grenville, 5 November 1791, 1 *HRA* 1, p. 267. Grenville's despatch arrived on the transport *Mary Ann* which arrived in Sydney on 9 July 1791. Bateson, *The Convict Ships 1789-1868*, p. 131.

<sup>86</sup> A list of the documentation actually received for the First Fleet is set out in the New South Wales State Records online site <http://www.records.nsw.gov.au/state-archives/research-topics/convicts/sentenced-beyond-the-seas/list-of-the-ships-included-in-sentenced-beyond-the-seas>.

what had been planned in London. The processes surrounding the subsequent delivery of the convicts in the Second and Third Fleets were implemented under an improved administrative system and provide no assistance in understanding what was intended to occur when the First Fleet reached Botany Bay.

To summarise the problem thus faced by Phillip in the period January 1788 to mid-July 1791: he had received no assignment of the property in the service of the convicts of the First Fleet, nor did he have any records as to their sentences.<sup>87</sup> By mid-July 1791, the sentences of some 400 convicts sentenced to five and to seven years transportation had expired. Phillip was provided with no guidance as to what to do with the expirees. Their circumstances had either been ignored in London, or had not been considered at the outset. This was despite the 1786 warnings of the East India Company hydrographer, Alexander Dalrymple mentioned earlier, about such an eventuality.<sup>88</sup> While some expirees did return to England by working their passage on returning ships, many who had no pre-disposition to remain in New South Wales would have preferred to return to England but lacked the means by which to do so.<sup>89</sup> The fragile state of an infant settlement provided insufficient employment opportunities for such a reluctant, but free, work force. The upshot was that Phillip, anticipating the later observations of John MacLaurin in Scotland in 1794 considered in Chapter 6, pragmatically retained the expirees ‘on the store’ in New South Wales in return

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<sup>87</sup> In November 1789, *The Voyage of Governor Phillip to Botany Bay* was published in London. The editor of the 1970 edition, JJ Auchmuty, argued that the text was a compilation of writings from various sources, rather than a manuscript prepared by Phillip in New South Wales. See p. ix. The appendix (pp. lx-lxxiv) sets out a list of the convicts sent to New South Wales in 1787 and includes the dates and places of sentences and the duration of sentence. The assumption then is that this list was obtained by the publisher in London, rather than from Phillip himself.

<sup>88</sup> Dalrymple and Mackaness, *Alexander Dalrymple's "A Serious Admonition to the Public on the Intended Thief Colony of Botany Bay." With a Memoir*, p. 24. See also Atkinson's *The Europeans in Australia*, p. 75.

<sup>89</sup> Phillip to Grenville; 5 November 1791, 1 *HRA* 1, pp. 267-274, at p. 270.

for their labour.<sup>90</sup> The line between the intended status of servitude and the status of the early expirees was thus blurred. This approach to the management of individuals in the colony, whose actual legal status was not clearly determined, was to be a feature of later colonial New South Wales. Prior to 9 July 1791 no convict could demonstrate freedom through completion of sentences, but Phillip could not disprove any claims made by the convicts, resorting, instead, to a pragmatic middle-ground. How Phillip responded to these difficulties is considered in Chapter 7.

The difficulty faced by current researchers into the processes utilised for the departure of the First Fleet is problematic because some critical documents no longer exist, assuming they ever did. It is tempting to conclude that the processes that were put in place for subsequent transportations to New South Wales were in place for the First Fleet, but there is little evidence for this and indeed the evidence suggests otherwise. Apart from Nepean's instruction to Shelton, and the evidence of the types of contract such as those mentioned above for the justices at Kingston-upon-Thames, there is no surviving evidence of documentation for the First Fleet prepared by Shelton. Shelton's accounts, which are considered below, do not cover any documentation for the First Fleet.<sup>91</sup> Anticipating, for the moment the later narrative, it is also clear that no documentation travelled with Phillip to

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<sup>90</sup> John MacLaurin, "Of the Punishment of Transportation", in *The Works of the Late John MacLaurin*, Volume 2 (Edinburgh, 1798), p. 69.

<sup>91</sup> Knowledge of Shelton's role in the documentation process, to the extent that it is understood at all, is largely due to the peculiar events surrounding the preparation of Shelton's accounts for his work which were not submitted to the Treasury in his lifetime. Shelton died in 1829. His nephew pursued the account with only limited success but, in the process, passed the undelivered accounts into the custody of the Treasury. From there they moved into the National Archives in London and are housed, more or less intact, in Audit Office file AO 3/291. Aspects of Shelton's documents are considered below.

New South Wales. It is also evident that some corrective legislation was necessary to give greater efficacy to subsequent transportations.

The underlying question that emerges from the details concerning the formation and departure of the First Fleet from England in 1787 is where did the idea of assignment of the services of transported offenders come from? Alternative models were available to the British government in 1786-7. One was to move convicts by use of warrants. This was the process used in Ireland from 1791 to 1798, considered in Chapter 5. Warrants were also the process that was used to move convicts to Portsmouth for transportation. It is likely that a warrant was seen as having no authority outside Great Britain.<sup>92</sup> The other model available was to designate New South Wales as a penal colony and to include into the commission of Governor Phillip the power to act as a gaoler similar to the powers of the governor of the penitentiaries, which were to be built pursuant to the 1779 legislation 19 Geo III c. 74 (the Penitentiary Act). The government did neither, probably thinking it too inappropriate a process or too late to implement properly.

At one level the response taken by the British government was obvious. The 1784 legislation which framed the process of transportation followed the 1717 formula of vesting the ‘property in the service of the offender’ in the transportation contractor. In America the contractor, through his agents (ship’s masters’) sold the transported convicts into servitude within the American colonial labour market. Importantly, as mentioned earlier, the American colonial system of common law had developed its own home-grown version of servitude, which enabled the

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<sup>92</sup> This was the conclusion of Bert Rice, ‘Were the First Fleet Convicts Bond or Free?’ *Journal of the Royal Historical Society of Victoria*, 55 (1984), pp. 44-47. Rice concluded that convicts were therefore indentured servants, without offering any explanation of how their servant status arose. This view is considered in Chapter 7.

contractors' sale of convicts to be a workable economic transaction. So why was it necessary to recreate the appearance of the American process when the reality was utterly different? There was to be no free labour economy in New South Wales for some years ahead.<sup>93</sup> Additionally, there was no locally developed common law to give efficacy to the assignment process. Not only were there no processes in place for managing convict labour in New South Wales, there was no record of the deployment of transported convict labour once in New South Wales ever being contemplated, other than in the measures contained in Phillip's Instructions of April 1787 which suggested that the produce from their labour should be a 'common stock.' This is examined in Chapter 7. The government's approach raises further questions, which remain unanswerable. Why did arrangements in London not empower Phillip to rely on statute? What about the use of the process of assignment of convicts' services at the time? The government seems to have contemplated a comparable process but there is no (surviving) record of such a process being considered, either by government or the law officers.<sup>94</sup> Importantly for this thesis, the approach adopted was to make the assignment of an offender in Australia entirely process dependant. This meant that, from an English perspective at least, if there was no assignment of the contractor's property in the service of an offender, then there was no servitude. This raises a further issue, which is considered below; what was the resulting status of a transported convict?

Thus far, by way of a response to the first question being considered here, that is—what were the 'customary' processes put in place for the assignment of

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<sup>93</sup> Evatt, "The Legal Foundations of New South Wales", p. 411. Evatt's footnotes make no sense. This would appear to be an editing error. Elsewhere Evatt cites HB Simpson, without naming him.

<sup>94</sup> As will be considered below, it was not until 1817 that any opinion was obtained from London on this point, but in circumstances which left the real position open to question.



property in the service of the offenders to the governors of New South Wales?—it is possible to conclude that no processes were put in place which could be categorised as giving rise to Governor Hunter’s reference to ‘customary’ process. A supplementary question then arises, what developed between 1788 and 1795 to give rise to Hunter’s reference? Fortunately, for the purposes of this thesis, there is an abundance of evidence.

Shortly before the First Fleet left Portsmouth in May 1787 George Moore, still in ‘possession’ of convicts in England attempted to assign his interest to William Richards. Moore had been appointed the British Consul in Salonica. On 2 April 1787, Moore appointed his nephew Thomas Quayle in London as his agent to complete the assignment. By an endorsement dated 10 June 1787 set out at the foot of the original instrument, Thomas Quayle assigned ‘all the Rights of the said George Moore’ to the ‘servitude or labor’ of fifty-one men and seven women convicts’ to Richards.<sup>95</sup> Quayle sent a copy of the completed documentation to Evan Nepean at the Home Office.<sup>96</sup> Unfortunately, Quayle’s letter is undated but, probably for the first time, the Home Department now had a precedent by which the masters of later convict transports could make an appropriate assignment of property in the services of the convicts on their vessels.

It is also evident that London was looking at improving the documentation surrounding the processes of transportation. Even before Phillip’s letter of July 1788 reached London, procedures were already being instituted to ensure that any failure of process as happened with respect to the First Fleet would not be repeated. The departure of the First Fleet from Portsmouth on 13 May 1787

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<sup>95</sup> Colonial Office; New South Wales original correspondence, CO 201/2, volume 2, f. 321, TNA.

<sup>96</sup> CO 201/2, volume 2, f. 319, TNA.

neither relieved the gaols of England nor did it diminish the sentencing of offenders to transportation by the English courts. By September 1788 steps were in train for further shipments of offenders to be sent to New South Wales. But, while the documentation of the First Fleet was unclear, the documentation for later vessels presents a much clearer understanding of the transactions involved. There were two reasons for this; first, there was a minor alteration to the legislative regime covering transportation; second, considerable improvements were made in preparation and delivery of documentation authorising transportation, due largely to the involvement of Thomas Shelton of the Old Bailey. On 15 May 1788, one year after the First Fleet had sailed from Portsmouth, Thomas Gilbert, the chairman of the committee of ways and means, introduced a continuation of laws bill into the House of Commons. The bill passed through the parliament and received royal assent on 11 June 1788 as the statute 28 Geo III c. 24.<sup>97</sup> As a result, provisions of the 1784 statute 24 Geo III c. 56, which authorised transportation from England, but which had contained a sunset provision, were extended in operation to 1 June 1793.<sup>98</sup> The last section of the statute contained an entirely novel provision which, from its language (and subsequent usage), must have been intended to cover the role of Thomas Shelton in the transportation process. As will be demonstrated, Shelton was to make extensive use of this statutory authority. Section 5 of the statute, which is quoted here at length, permitted the King, under the sign manual, to:

authorise and empower any Person or Persons to make Contracts for the effectual Transportation of such Offender and (sic) Offenders, and to direct to what Person or Persons Security shall be given for the effectual Transportation of such Offender or

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<sup>97</sup> See *JHC*, Volume 43 (1787-1788), pp. 471 and 544.

<sup>98</sup> As mentioned elsewhere, no attempt was made to extend the statute 25 Geo III c. 46 authorising transportation from Scotland, which contained the same sunset provision.

Offenders; and every such Contract and Security shall be equally valid and effectual, and every Person contracting for the Transportation of any Offender or Offenders with any Person or Persons so authorised by his Majesty as aforesaid, shall have the like Property in the Service of such Offender or Offenders, as if such Contract had been made, and such Security had been given, in the Manner required by the said Act of the twenty-fourth Year of his Majesty's Reign.<sup>99</sup>

Under this slightly different legislative framework, transportation documentation was reformulated. Some of the original documents have survived and present a clearer understanding of how transportation was authorised and demonstrate how the status of transported convicts was determined. This process was far more complex than is contemplated in existing historical accounts and extends far beyond the processes outlined by the Law Officers to Lord Sydney on 19 December 1786.<sup>100</sup>

Before the new legislation was put into effect, however, the government implemented a once-off shipment of female convicts to New South Wales. The relevance here is that, while the state of accompanying documentation is not existent, and there is no evidence of any input from Thomas Shelton into the administrative processes, the resulting documentation proved to be remarkably prescient, anticipating the legislative changes of 1824 by almost exactly thirty-five years. On 19 July 1789, the newly appointed Secretary of State for the Home Department, William Grenville advised Governor Phillip of the despatch of 226

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<sup>99</sup> The last reference is to 24 Geo III c. 56, the 1784 statute authorising the resumption of transportation.

<sup>100</sup> The works of Wilfred Oldham and Alan Frost which provide some analysis have already been mentioned. The line of literature which documents individual voyages concentrate on biographical details of the convicts, their sentences, and subsequent careers in Australia but they omit entirely any consideration of the organisational or legal framework by which the voyage was organised and their individual statuses affected. Examples of this line of literature include M Gillen and Y Browning's *The founders of Australia: a biographical dictionary of the First Fleet* (Sydney, 1989) and S Rees's *The floating brothel: the extraordinary true story of the Lady Julian and its cargo of female convicts bound for Botany Bay* (Sydney, 2001).

female convicts on the *Lady Juliana*.<sup>101</sup> In his despatch, which accompanied the convicts, Grenville advised Phillip that:

The service of the unfortunate women on board the *Lady Juliana* will, upon their landing at Port Jackson, be transferred to you, and you will cause them to be employed in such manner as may be most conducive to the advantage of the settlement.<sup>102</sup>

Whether Grenville thought that his use of the words ‘will be transferred to you’ constituted sufficient authority is not clear. The only difficulty with such an approach is that, following the passage of 28 Geo III c. 24, Grenville would not, without an instrument from the King, have had sufficient authority to make the purported assignment of the female convicts. No instrument from the King is mentioned in the records of the Privy Council. The *Lady Juliana* departed Plymouth of 29 July 1789 and arrived in Port Jackson on 21 February 1790.<sup>103</sup>

Following the departure of the *Lady Juliana* a marked change in processing convicts for transportation was instituted. At the same time, the surviving records of Thomas Shelton provide near-contemporaneous records of the various transactions associated with almost all of the transport vessels to leave England until his records ceased in 1829.<sup>104</sup> Since all convicts transported from Scotland were processed through England, Shelton’s records, though not as fulsome on Scotland as they are on England, provide some insights into Scottish procedures as well. Records for transportations from Ireland are not similarly recorded, and

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<sup>101</sup> William Grenville was sworn a Privy Councillor and Secretary of State on 5 June 1789. See Privy Council Register PC 2/134, pp. 85-6, TNA. Grenville remained in the position until 1791. See P. J. Jupp, ‘Grenville, William Wyndham, Baron Grenville (1759–1834)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2009 [http://www.oxforddnb.com/view/article/11501, accessed 31 Aug 2015]

<sup>102</sup> Grenville to Phillip; 19 June 1789: 1 *HRA* 1, p. 120.

<sup>103</sup> Bateson, *The Convict Ships 1789-1868*, p. 121.

<sup>104</sup> Shelton’s accounts are housed at the National Archives, Kew AO 3/291. Byrnes’s online *Pathways to Convict Contractors to Australia from the 1780s to the 1860s* helpfully itemises each account against the appropriate convict transport vessel. See <http://www.merchantnetworks.com.au/timelines/pathways1.htm>

only those which reached New South Wales and have survived in the State

Records of New South Wales provide any insight into the Irish processes.

Between 12 September 1790 (two years and three months after 24 Geo III c. 24 entered into force) and April 1791, fourteen convict transports sailed from England and one from Ireland to New South Wales in what are usually referred to as the Second and Third Fleets.<sup>105</sup> Records for all of these voyages were recorded by Shelton: Table 6 provides an overview.

**Table 6: Overview of Shelton's Accounts Nos. 1 to 4**

	Account & AO 3/291 folio	Date	Transports	No. of convicts	Contractor
Second Fleet	Acc. No 1 ff. 1 - 2	20 July 1789	<i>HMS Guardian</i>	25	Lt. Riou (Navy)
	Acc. No 2 ff. 3-30	November 1789	<i>Neptune, Scarborough, Surprize</i>	928	George Whitlock
Third Fleet	Acc. No 3 ff. 31-64	January 1791	<i>Atlantic, William and Ann, Britannia, Matilda, Salamander, Albemarle, Mary Ann, Barrington, Active</i>	1792	Messrs Camden Calvert and King
	Acc. No 4 ff. 65-69	February 1791	<i>HMS Gorgon</i>	31	Cmd. Parker (Navy)

Compiled from AO 3/291, folios 1-69 and Bateson, C., *The Convict Ships 1789-1868*, (Glasgow, 1969). Account Nos 1 and 2 cover the vessels of the Second Fleet omitting the *Lady Juliana*, while Account Nos. 3 and 4 cover the vessels of the Third Fleet omitting the *Queen* which sailed from Ireland. The numbers of convicts are the numbers embarked.

<sup>105</sup> The concept of a 'Second' and a 'Third' fleet are not fixed. For example, the more usual usage adopted by the State Records of New South Wales and Dan Byrnes places the *Lady Juliana* and *HMS Guardian* as vessels of the Second Fleet; Byrnes refers to them as the 'first wing' of the Second Fleet. Similarly, the *Mary Ann* and *HMS Gorgon* are sometime categorised as being in the Third Fleet (again, State Records of New South Wales usage) but are sometimes placed in the Second Fleet. To avoid confusion, the practice here, apart from the six original transports of the First Fleet, all vessels are referred to by name. All sailing dates are drawn from Bateson, unless mentioned otherwise. Bateson, *The Convict Ships 1789-1868*.

Account No. 1 covered the ill fated *HMS Guardian* and totalled £7 18s 6d.<sup>106</sup> The *Guardian* departed Spithead on 12 September 1789 with some 300 passengers and crew and twenty-five male convicts.<sup>107</sup> This small number of convicts is reflected in the brevity of the account, which comprises only one and a-half pages.<sup>108</sup> Of interest to this research is the fact that the account suggests that the commander of *HMS Guardian*, Lieutenant Edward Riou RN, signed a contract for the transportation of the convicts and provided sureties, despite the fact that the vessel was a naval store ship and not a commercial transport vessel. The account also suggests that Lieutenant Riou completed or was to complete an assignment of the twenty-five convicts despite his not being a contractor as contemplated in the legislation.<sup>109</sup> This may explain the reasons for the passage of the 1788 legislation. In effect, then, any technical incapacity in the status of the ‘contractor’ would have been rectified by section 5 of 28 Geo III c. 24 quoted above. Since the *Guardian* never reached Australia, there is no corroborative evidence of the documentation being drawn up in the manner suggested by the accounts. Shelton intended to charge £1 for the contract and 13s 4d for the assignment. The account makes no mention of activities necessary to assemble the twenty-five convicts for transportation and facilitate their despatch to Portsmouth.

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<sup>106</sup> AO 3/291, f. 1, TNA.

<sup>107</sup> The fate of the *Guardian* is summarised by Bateson. The vessel struck an iceberg on 22 December 1789 disabling her. For nearly two months, the vessel wandered around the southern Indian Ocean until coming to rest near Saldanha Bay in South Africa where the survivors, including twenty of the convicts, were rescued. See Bateson, *The Convict Ships 1789-1868*, pp. 124-6. Lt. Riou’s exploits in command of the stricken vessel generated its own hagiography, none of which touches on the issues considered here. See for example, Rod Dickson, *HMS Guardian and the island of ice: the lost ship of the First Fleet and Lieutenant Edward Riou, 1789-1790* (Carlisle, WA, 2012), and MD Nash, ed., *The last voyage of the Guardian : Lieutenant Riou, commander, 1789-1791* (Cape Town, 1990).

<sup>108</sup> AO 3/291, f. 1, TNA.

<sup>109</sup> The deployment of naval vessels was to recur occasionally and led, in 1802 to special legislation to address these anomalies. The act 43 Geo III c. 15 is considered below.

The layout of Shelton's Account No. 1 for *HMS Guardian* framed the format of later accounts. The 1830 audit of Shelton's accounts by the Audit Office assessed each account in terms of the costs of three basic activities: stamps and paper; charges and disbursements; and professional charges. The cost of stamps (stamp tax or duty) particularly excited the Audit Office, suggesting that it need not have been paid.<sup>110</sup> What the Audit Office characterised as 'professional charges' broadly identify the documents created by Shelton and which go to the centre of this research; put another way, they identified Shelton's deliverables within the transportation process. These fall into two broad classes; lists and legal instruments. Lists recorded the particulars of each convict being transported and were made available to the Privy Council Office, the Home Department and, later, the governor of New South Wales.<sup>111</sup> The legal instruments cover a range of documents. These included contracts, bonds for security, and, in some cases, warrants for the removal of convicts from regional gaols to the transports in Portsmouth. While there were variations in approach in later accounts, Shelton, or his accounts clerk, approached the matter much as a twentieth-century solicitor's office would approach the preparation of an account for a client, mixing professional charges with general charges and disbursements and masking the separate roles of the lawyer and the legal clerks.

The professional charges in Account No. 1 opened with a general claim for 'procuring and perusing' documentation and writing: this head of claim covered Shelton's time in deciding what elements of the law he needed to bring together.

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<sup>110</sup> AO 3/291, ff. 1591-3, TNA.

<sup>111</sup> The lists prepared by Shelton became significant in New South Wales in the absence of any formal instruments. This was most apparent in the period after mid-1791 until 1800 which is considered below.

Shelton charged £1 1s (or one guinea) for this activity. The account then itemised four different deliverable documents that Shelton produced. The first of these involved ‘Drawing Contract from Lieutenant Riou to transport such convicts’ and to get testimonials of their landing. As discussed below, the documentation for subsequent accounts gives a better understanding of this ‘Contract’. The second activity and professional charge was for ‘drawing’ the bond for Lieutenant Riou and his sureties to execute by way of performance. This requirement was to remain largely unaltered during Shelton’s tenure and followed the requirements of the statute 24 Geo III c. 56. The third, and novel, activity and professional charge was for ‘drawing and engrossing’ the assignment from the ‘contractor’ i.e. Lieutenant Riou, to Governor Phillip. The roles of the clerks, which are not separately accounted for, but can be reasonably deduced, included ‘engrossing’ relevant documents, ‘attending and attesting’ their execution, and making ‘fair copy lists’ of convicts already mentioned. These activities are considered further below. The last deliverable was a further ‘fair’ list of convicts ‘to be annexed to His Majesty’s warrant authorizing me to Contract for the transportation of them.’<sup>112</sup> Shelton charged 2s 6d for this activity. This must have been the first occasion upon which the King’s warrant had been issued under such circumstances.

On 18 July 1789 (two days prior to the date of the account) a warrant was issued, signed by the King, authorising Shelton to enter into a contract for the transportation of twenty-five convicts.<sup>113</sup> The use of the power under the sign manual is curious. The warrant certainly authorised Shelton to enter into a

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<sup>112</sup> AO 3/291 f. 1, TNA. In Account No. 2, Shelton charged £6 for the same function, suggesting that, on the second occasion, he drew the warrant as well.

<sup>113</sup> Home Office Criminal Entry Books, HO 13/7, pp. 125-8, TNA.



transportation contract, yet neither the legislation nor the warrant mentioned in what capacity. The documentation for the *Guardian* has not survived, but those for the vessels of the Second and Third Fleets have, and these make it clear that Shelton was exercising the power under the warrant as if he himself had taken the primary assignment of the property in the service of the convicts or that it had somehow been bestowed upon him. The contract was then being used as the device for Shelton personally to assign the property to the contractor. Shelton's role in the transportation process thus became pivotal: it was also to be short lived.

Account No. 2 was for £601 18s 6d and covered the three commercial vessels of the Second Fleet supplied by George Whitlock. Account No. 3 was for £719 1s 2d and covered the nine commercial vessels of the Third Fleet supplied by Messrs Camden, Calvert and King.<sup>114</sup> Both accounts present differently to Account No 1 and, between them, they cover the transportation of 2,020 convicts. Their value lies in the fact that all the principal documents for the transportation of these convicts are still available and give the first real insight into the entire transportation process that was put in place in England during 1789 and 1791. A warrant authorising Thomas Shelton's role in Account No. 2 was issued by King George III on 30 October 1789.<sup>115</sup>

The most obvious point of difference between Account No. 1 and Account Nos. 2 and 3 is that the latter two accounts demonstrate that Shelton had some involvement in the assembly of convicts from all over England and Wales. The

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<sup>114</sup> Account No. 2 is contained in AO 3/291, ff. 3 to 30, Account No. 3 is contained in AO 3/291 ff. 31 to 64. According to the Audit Office, Account No. 3 was understated by £100.

<sup>115</sup> *HRNSW Volume 1, Part 2*, pp. 280-1.

1784 statute 24 Geo III c. 56 bestowed the power to transport convicts on to trial courts which were identified in the legislation as comprising:

any Session of Oyer and Terminer, or Gaol Delivery, or at any Quarter or other General Session of the Peace, to be holden for any County, Riding, Division, City, Town, Borough, Liberty, or Place, within that Part of Great Britain called England, or at any Great Session to be holden for the County Palatine of Chester, or within the Principality of Wales<sup>116</sup>

Many of these separate jurisdictions were specifically mentioned in Shelton's early accounts, suggesting that Shelton had direct contact with each in order to manage the assembly of offenders under sentence or order of transportation in compliance with the legislative and consequential administrative processes considered necessary to complete transportations within the law. Account No. 2 covered 1068 convicts gathered from 105 different jurisdictions, while Account No. 3, covered 1792 convicts gathered from 134 different jurisdictions. This fact takes primacy of place in Account Nos. 2 and 3 and explains their length (see the number of folios listed in Table 7). It also explains the emphasis on the compiling of lists of convicts, some of which, as indicated, were lengthy. From Account Nos. 2 and 3 it becomes clear that, in addition to other duties, Shelton and his clerks were acting as a secretariat with respect to these lists. Why this was not done in the Home Department is not clear.<sup>117</sup>

Lists of convicts were prepared for attachment to the orders in council designating New South Wales as the destination. Since names were also added later, and subsequent orders in council issued, further lists were prepared for the Privy

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<sup>116</sup> 24 Geo III c. 56, section 1.

<sup>117</sup> RR Nelson points out that the Home Office in 1789 comprised a chief clerk and eleven other clerks. The only direct role in transportation concerned appeals for mercy from the king which passed through the office. Shelton and his clerks at the Old Bailey are not mentioned. See Nelson, *The Home Office, 1782-1801*, pp. 48, 99-100. JC Sainty's numbers more or less agree. J.C. Sainty, *Home Office Officials 1782-1870, Office-Holders in Modern Britain* (London, 1975), pp. 16-7.

Council office from time to time.<sup>118</sup> At the end of the accounts were general claims for the preparation of a further list of convicts ‘for His Majesty’s Secretary of State for the Home Department’.<sup>119</sup> The reason for this list seems curious unless the Home Department did not have a list in the first place. This may suggest that in 1789 and 1791 Shelton was compiling the initial lists of convicts to be transported ahead of the involvement of the Home Department, hence the regional basis for the formulation of the accounts and, perhaps, a greater degree of involvement in the process of moving convicts into the hulks. Later accounts suggest the prior input of the Home Department.

Further lists of convicts were prepared to be added to the warrants issued under the king’s sign manual authorising Shelton to enter into a contract for the transportation of the convicts.<sup>120</sup> A warrant, signed by the king, was issued on 30 October 1789 authorising Shelton to enter into contracts for the transportation of an unspecified number of convicts who would, according to the dates, have been embarked on the *Neptune*, *Scarborough*, or the *Surprise*.<sup>121</sup> Shelton appears to have adopted the drafting practice of referring to the warrants under the sign manual in the texts of the resulting contracts. Unfortunately, no dates were in fact inserted into the texts of the copies of the three Indentures for the three vessels retained in the New South Wales State Archives.<sup>122</sup> Similarly the indentures for the nine vessels in the Third Fleet were also left blank.

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<sup>118</sup> AO 3/291, ff. 26, 59, TNA.

<sup>119</sup> AO 3/291, ff. 26, 62, TNA.

<sup>120</sup> AO 3/291, f. 25 (verso), 59 (verso), TNA.

<sup>121</sup> CO 201/4, ff. 161-2, TNA.

<sup>122</sup> For the *Neptune* see SRNSW: NRS 1150 [SZ115] 1150\_SZ115\_0098. For the *Scarborough* see NRS 1150 [SZ115] 1150\_SZ115\_0102. For the *Surprise* see NRS 1150 [SZ115] 1150\_SZ115\_0086.

Working through each of the vessels in turn in Account Nos. 2 and 3, Shelton itemised his activities. The first activity was ‘Drawing contract for [the contractor] to transport the convicts according to sentence’.<sup>123</sup> This was repeated for each jurisdiction. This suggests that Shelton received 105 such contracts with respect to the Second Fleet and 134 contracts for the Third Fleet. None of these documents appear to have survived. But this may simply reflect some confusion in the preparation of the accounts, and not the transportation documentation. The nearest equivalent document to survive of this type is that drawn by the justices at Kingston-upon-Thames mentioned earlier. This enabled the contractor to collect the convicts under sentence or order of transportation from the local gaol and deliver them to the hulks at Portsmouth. It might also have justified the 1788 legislation 28 Geo III c. 24. Shelton appears to have managed the contract documentation instead of the clerks or justices of each sentencing court. This would have streamlined the process and ensured that they were completed in a timely manner.

The second document prepared by Shelton was an ‘Assignment and Transfer to the Contractors of the convicts embarked on board’ each vessel. This document related to each convict transport and not each jurisdiction and explains the ship-by-ship arrangement of the subsequent documentation. The ‘Assignment and Transfer’ of the convicts was drawn as an arrangement between Shelton and the contractor. While Shelton only charged 6s 8d for ‘Instructions’ he went on to charge £2 1s for ‘drawing’ (drafting) and the same amount for ‘Ingrossing’ two copies of each. These documents, despite the reference in the Account, were to be

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<sup>123</sup> By way of example, see Account No. 3, AO 3/291, folio 31, TNA.

the ‘Indentures’ for the several vessels of the Second and Third Fleets. Original copies of these instruments are retained in the New South Wales State Archives, where they are referred to as ‘Indents’. In all, Shelton prepared twelve such indentures. Shelton also charged for his attendance at the execution of the assignments and of the bonds. While the accounts suggest a separate document, the assignments of the convicts on the vessels of the Second and Third Fleets from the contractor to the governor of New South Wales was achieved by means of endorsements placed at the foot or on the verso of each instrument. Copies of the assignments of the various convicts on each of the vessels of the Second and Third Fleets can be seen in the documents retained in the New South Wales State Archives.<sup>124</sup>

Sometimes the embarkation of the convicts did not go according to plan. Account No. 2 included the cost of an additional ‘assignment to the contractor’ covering ‘44 other convicts’ loaded after the original embarkation.<sup>125</sup> Account No. 3 included an additional claim for delays caused by the unpreparedness of the vessels at the embarkation of the convicts in 1791. This led to some convicts being placed on to different transports. To keep the documentation accurate, Shelton sent one of his clerks to Portsmouth to record the changes and revise the

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<sup>124</sup> For the *Atlantic* see SRNSW: NRS 1150 [SZ115] 1150\_SZ115\_0172; for the *William and Ann* see NRS 1150 [SZ115] 1150\_SZ115\_0190; for the *Britannia* see NRS 1150 [SZ115] 1150\_SZ115\_0217; for the *Matilda* see NRS 1150 [SZ115] 1150\_SZ115\_0161; for the *Salamander* see NRS 1150 [SZ115] 1150\_SZ115\_0182; for the *Albemarle* see NRS 1150 [SZ115] 1150\_SZ115\_0198; for the *Mary Ann* see NRS 1150 [SZ115] 1150\_SZ115\_0153; for the (Admiral) *Barrington* see NRS 1150 [SZ115] 1150\_SZ115\_0224; and for the *Active* see NRS 1150 [SZ115] 1150\_SZ115\_0209.

<sup>125</sup> This resulted in a separate indenture dated 4 December 1789. SRNSW: NRS 1150 [SZ115] 1150\_SZ115\_0098. The additional cost is itemised at AO 3/291 f. 26, TNA.

documentation. Shelton charged £6 6s for labour and £6 6s for the hire of a coach and expenses.<sup>126</sup>

Two other features of the indentures for the vessels of the Second and Third Fleets which were not mentioned in Accounts Nos. 2 and 3 is their layout. The names of the convicts are set out in three lists headed A, B, and C. These reflected the need to alter earlier sentences which had contemplated transportation of the named offenders to ‘America’, or to ‘Africa’, or just ‘beyond the Seas’. The overall effect then was that, notwithstanding the original sentence, all the named convicts could legally be transported to New South Wales.<sup>127</sup> This process worked itself out with the departure of the Third Fleet in 1791 and was not repeated after 1792.

Additionally, the indenture for the *Neptune* referred to both felons and misdemeanants, suggesting that some at least of the transported convicts were not felons.

Some general observations about Accounts Nos. 2 and 3 are necessary. The Indenture between Shelton and each of the contractors for each vessel related only to those aspects of the contracts that touched on the need for security bonds and testimonials of landing the convicts in New South Wales and the transfer of property in the service of the convicts, first from Shelton to the contractor and then from the contractor to the governor of New South Wales. These contracts had nothing to do with the hiring of the transport vessels themselves. Whether there was, or was not, a contract between the Navy and the Home Department for the availability of *HMS Guardian* remains obscure. But, as mentioned below, with

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<sup>126</sup> AO 3/291 f. 62, TNA.

<sup>127</sup> For the *Neptune* see SRNSW: NRS 1150 [SZ115] 1150\_SZ115\_0098. For the *Scarborough* see NRS 1150 [SZ115] 1150\_SZ115\_0102. For the *Surprise* see NRS 1150 [SZ115] 1150\_SZ115\_0086.

respect to other vessels of the Second Fleet, namely *Neptune*, *Surprise*, and *Scarborough*, a contract was independently drawn between George Whitlock (owner of, or agent for, the vessels) and the Navy Board for these vessels and their supplies. The contract was dated 27 August 1789 and Whitlock was to be paid £17 7s 6d for each convict embarked.<sup>128</sup> Similarly, a contract was signed on 18 November 1790 with Messrs Camden Calvert and King for the nine vessels of the Third Fleet. The contractors were to be paid £44,658 13s 9d to carry 1,820 English and 200 Irish convicts to New South Wales.<sup>129</sup> It was these contracts, and not the contracts to which Shelton was a party, that chartered the vessels and set the amounts payable by the British government to the contractor.

A final comment about Account Nos. 2 and 3 needs to be made. It is clear that, in preparing the documentation for transportation, transportation was only contemplated as encompassing transportation from England and Wales pursuant to the 1784 statute 24 Geo III c. 58. This becomes apparent when transportation from Scotland commenced during 1791 and is considered in Chapter 6.

Shelton's last account to be considered here (Account No. 4) covered thirty-one convicts carried to New South Wales in *HMS Gorgon*.<sup>130</sup> The account, of February 1791, reflects the smaller number of convicts being carried but, like Account Nos. 2 and 3, presented an inventory of fourteen separate jurisdictions in England from which the convicts were assembled. The account similarly overlooks the fact that, as a naval vessel it would not, like *HMS Guardian*, have

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<sup>128</sup> CO 201/6, ff. 273-6, TNA. The flat rate of payment, without regard to the health of the convicts at arrival is blamed for the high mortality of convicts and soldiers on the vessels of the Second Fleet. See Bateson, *The Convict Ships 1789-1868*, pp. 127-9.

<sup>129</sup> Michael Flynn, *The Second Fleet: Britain's Grim Convict Armada of 1790* (Virginia, 2001), p. 75.

<sup>130</sup> AO 3/291 ff. 65-8, TNA.

been in contemplation in the statute 24 Geo III c. 56. Similarly, Commander Parker RN, who was recorded in the account as having given a bond by way of security for performance, would not normally have been in a position to do so. Shelton may have been relying on the operation of 28 Geo III c. 24 to overcome any shortfall in capacity. A bond appears to have been prepared for each of the fourteen jurisdictions.<sup>131</sup> The statute 24 Geo III c. 56 required the bond to be lodged with the sentencing court. This becomes evident from Shelton's jurisdiction by jurisdiction approach to some of the early accounts.<sup>132</sup> The use of king's ships for the purposes of transportation was to recur in 1802 and 1803, giving rise to the need for further legislative change to the property in the services of the offender formula.

While orders in council were being prepared, contracts for the shipment of the convicts and the delivery of appropriate security were drawn up through the auspices of Thomas Shelton exercising authority derived from Section 5 of 28 Geo III c. 24, as considered earlier. This would have included the preparation and execution of the indenture which, drawing from the lists utilised by the Home Department to prepare the orders in council, listed the convicts to be transported to New South Wales, their sentences, and places of trial and included provisions for the assignment or transfer of the property in their service from the transportation contractor to the governor of New South Wales. The evidence for these transactions, omitting the Scottish sentencing records is, presently, to be found in the minutes of the Privy Council.<sup>133</sup> Copies of the orders in council and

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<sup>131</sup> *Ibid*, ff. 65-7.

<sup>132</sup> 24 Geo III c. 56, sections 2 and 3.

<sup>133</sup> In this thesis use has been made of The National Archive files Privy Council Registers, PC 2/135-155.



relevant indentures were (or should have been) sent to Sydney for the use of the colonial administration. Surviving documents in this collection are held by the New South Wales State Archives and are increasingly being made available online.<sup>134</sup> The latter collection also includes later colonial lists of convicts prepared for local administrative purposes, sometimes in the form of ‘attested extracts’ from the indentures which may not necessarily reflect the true legal nature of the transaction at hand.

It is now possible to offer a response to the questions: what were the ‘customary’ processes by which the servitude of convicts was assigned to the governors of New South Wales as contemplated by Governor Hunter in 1795; how had these evolved up to 1795, and what is the evidence? From the abundant, though not complete, evidence it can be concluded that, from the perspective of England, highly developed documentation was developed in England by which the King in council authorised the transportation of individual convicts named in the orders in council. Thomas Shelton, under the auspices of the Home Department and separate warrants under the sign manual, entered into separate arrangements with each jurisdiction holding convicts under sentence or order of transportation. Shelton then entered into further contracts with each of the contractors already designated by the Navy Board to ship offenders to New South Wales. By means of these contracts Shelton passed what he purported to be his own ownership in the property in the service of the convicts named in the lists attached to the

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<sup>134</sup> Early records for the period before the 1820s are incomplete as is quickly discernible from the New South Wales State Archives online: *List of the ships included in ‘Sentenced beyond the Seas’*. <http://www.records.nsw.gov.au/state-archives/research-topics/convicts/sentenced-beyond-the-seas/sentenced-beyond-the-seas>. No complete analysis of the texts of all the relevant orders-in-council appears to have been attempted and, in the period prior to 1820, there are few complete orders in council or indents.

contracts. Each of these instruments then recorded an assignment of the contractors' newly acquired rights to the governors of New South Wales once the convict transport delivered its human cargo to Sydney. By the time Hunter's despatch was sent to London in October 1795, twenty-eight convict transports had reached Port Jackson. Three of these were from Ireland which raised complications of their own and these are considered in Chapter 5. Of the remaining twenty-five convict transports, as has already been demonstrated, there was no documentation for the six transports of the First Fleet or for the *Lady Juliana* in 1790. From the arrival of the *Surprise* on 26 June 1790 full indentures provided for the assignment of the disembarked convicts and completed the processes of assignment to the governor of New South Wales who thus acquired the property in their services. Hunter must have acquired his understanding about the processes from officers in the administration already in the colony. Only one convict transport arrived in Port Jackson between him taking up the administration of the colony and his despatch to London. This was the *Surprise* which arrived in Sydney on 25 October 1795, the day of the despatch. The *Surprise* brought the Scottish martyrs to New South Wales, thus giving rise to Hunter's query.

Having examined the processes of transportation from England to New South Wales up to 1795 and to four of Shelton's accounts and what they reveal about the processes of transportation, what do later shipments and Shelton's later accounts reveal? What becomes apparent from this research is that, following the departure of the Third Fleet in 1791, two changes occurred in the documentation used in the transportation process. One change affected the fundamental rationale of the

transportation process and altered Shelton's participation in it. The other change recognised the transportation of convicts sentenced by the courts of Scotland and is considered in Chapter 6. Table 7 provides an overview of the relevant accounts and the transportation vessels employed. During the same period a total of eighteen transports carried convicts to New South Wales.

**Table 7: Overview of some of Shelton's accounts between 1791 and 1803**

Account & AO 3/291 folio	Date	Vessels	No. of convicts	Contractor
Acc. No 5: ff. 69-99	15 June 1791	<i>Pitt</i>	419	George Mackenzie Macauley
Acc. No 7: ff. 31-64	8 May 1791	<i>Royal Admiral</i>	352	Thomas Larkins
Acc. No. 10: ff. 117-8	February 1794	<i>Surprise</i>	100	Anthony Calvert
Acc. No. 11: f. 121	27 January 1795	<i>Sovereign</i>	1	Andrew Towers
Acc. 19: ff. 190-201	29 March 1800	<i>Royal Admiral</i>	426	Gabriel Gillett
Acc. No. 24: f. 268.	9 February 1803	<i>HMS Calcutta</i>	291	Navy

Compiled from AO 3/291 folios 69-268, TNA. Eighteen convict transports from England and Ireland are not included.

The original transmission documents for the convicts, i.e. those created by Shelton, as opposed to those listed in his accounts, take a change of direction in March 1800. Shelton's Account No. 19 recorded an agreement dated 29 March 1800 with Gabriel Gillett to transport 426 convicts (including seven from Scotland) to New South Wales in the transport *Royal Admiral* (2). Shelton charged £309 0s 2d for the convicts who had been assembled from forty-nine different English jurisdictions and 'Scotland'.<sup>135</sup> Apart from the ever-present lists, Shelton drew up a contract to transport the convicts from England to New South Wales but only an assignment of the Scottish convicts to the governor of New

<sup>135</sup> AO 3/291, ff. 190-201, TNA.

South Wales. The terms of the account seem to have little reference to the surviving documents of the transportation of the convicts, suggesting mere repetition on the part of the accounts clerk, rather than any accurate description of what documents were actually being produced.

The outcome of this process in 1800 was (as far as can be determined) the first ‘deed of assignment’ which replaced the earlier ‘indentures’. A copy of this new form of documentation which was used for the *Royal Admiral* is available online.<sup>136</sup> A similar approach to documentation was utilised for the transport *Earl Cornwallis*, covered by Shelton’s Account No. 20, dated 6 August 1800.<sup>137</sup> The form of documentation, a deed poll executed by the contractor alone, was to be the final form of documentation for the transfer of property in the service of transported convicts until the legislation took a new direction in 1824. The new documentation had the effect of removing Shelton entirely from the proprietary transfer process associated with property in the service of transported convicts and, thus, was more in line with the original framework of the 1784 legislation, 24 Geo III c. 56. Shelton’s role after the change of documentation was to provide the secretarial support for the documentation only, although, from the accounts, it would appear that warrants under the royal sign manual were still being issued.

A question that needs to be considered here is why was the alteration in documentation in 1800 necessary? There is no direct evidence which answers that question; there are no opinions from the Law Officers of the Crown to suggest that the indentures and Shelton’s direct participation were inappropriate. Nor is there any direct evidence of the point at which the documentation shifted from

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<sup>136</sup> SRNSW: NRS 1150 [4/3999] 1150\_4\_3999\_000024.

<sup>137</sup> SRNSW: NRS 898 [2/8283] 898\_2\_8283\_000021.

that of an indenture, to the more straightforward deed of assignment. But one event might provide some insight into this change; this reflects alterations in the staffing within the Home Department. By the end of 1790 and the completion of arrangements for the departure of the Third Fleet, the arrangements set up by Thomas Shelton, possibly in 1787, but certainly in 1789 for the Second Fleet (as evidenced by Shelton's Account's Nos. 1 to 4), had run their course. In future, instead of transporting convicts in multiple vessels carrying around 1,000 convicts at a time, a more orderly process was to be put in place hiring vessels to carry between 300 to 400 convicts at a time, and on a regular basis. This process started with the despatch of the *Pitt* in mid-1791. In January 1791, as the Third Fleet transportation documentation was nearing completion, a new law clerk joined the Home Department; John King. King was from Lancashire, a barrister, and a protégé of Lord Grenville, the then Secretary of State for the Home Department.<sup>138</sup> According to King's biographer, King was:

one of a group of talented young civil servants that was to be responsible for the administration of government under William Pitt the younger in the 1790s during the war against the French Revolution and the struggle against domestic radicals and reformers: a group which included men such as Francis Freeling, William Wickham, William Huskisson, and Evan Nepean.<sup>139</sup>

By December 1791, King had been appointed an Under-Secretary in the Home Department under Henry Dundas, himself a Scottish trained lawyer. With two experienced lawyers now in supervisory positions within the Department it is tempting, but no more than that, to believe that Shelton's documentation came

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<sup>138</sup> <http://www.historyofparliamentonline.org/volume/1790-1820/member/king-john-1759-1830> (accessed, 20 May 2014).

<sup>139</sup> Stephen M. Lee, 'King, John (1759–1830)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 [<http://www.oxforddnb.com/view/article/64119>, accessed 20 May 2014]. This would have possibly given King some association with the spy network operated by Nepean which included Shelton.

under professional legal scrutiny. As mentioned below, Dundas's arrival in office saw alterations to the processing of Scottish convicts. It would be realistic to assume also that King or Dundas oversaw a rationalisation of the technical aspects of the transportation process, whereby Shelton became merely the clerical agent of the Home Department and ceased to be part of the process himself. King was to be similarly involved in the rationalisation of both the Irish and Scottish processes during 1795 and 1797 considered in later chapters.

It is clear from the foregoing analysis that, even though the accounts after 1791 provided little detail of the actual documentation being produced, one clear conclusion can be drawn. At the heart of all the processing of documentation was the central requirement to invest each transportation contractor with the capacity to assign property in the service of each transported convict to the governor of New South Wales. The actual processes put in place in England for the First Fleet convicts remains unclear, both because Shelton's accounts did not record the processes and the original documentation, if it ever existed, never made it to New South Wales. The first comprehensive understanding of what happened materialised for a short period between 1789 and 1791 with the processes put in place for the convicts in the Second and Third Fleets. These transactions can be viewed both through Shelton's accounts and the original documentation in New South Wales supported by the orders in council and some of the warrants issued under the king's sign manual. Between 1791 and 1800, while the accounts provide a commentary of developments, the absence of the original documents created by Shelton mask the evolution of what eventually turned out to be the final form of transfers in the form of the deeds of assignment from the contractor to the colonial

governor. This final form of documentation survived until the reforms of Secretary of State Robert Peel in 1824 made much of the bureaucracy redundant. These changes are considered in Chapter 8. But Shelton's accounts go further: they demonstrate the implementation of an intensely detailed process which had one singular purpose. This was to ensure that property in the service of a transported convict was assigned to the governor of New South Wales upon the arrival of each convict in the colony. Put another way, the intended result of all these processes was to place each convict in New South Wales into servitude.

It is useful to note that the use of 'Indenture' at the opening of the documentation with respect to the *Neptune* in November 1789 was later shortened to 'Indent' and is used by the New South Wales State Archives as the entry point to inquiries about the identification of transported convicts.<sup>140</sup> By the mid-1820s and the end of the use of such documentation, the format of the documentation had altered; the primary purpose was now evident in the title as 'Deed of Assignment', although they remain within the New South Wales State Archives as 'Indents'.<sup>141</sup> The point of etymological confusion here is that, once the process of documentary assignment ceased and was replaced by statutory assignment after 1824, the documentation listing the transported convicts continued to be referred to as 'Indents'. Thus 'Indents' could mean different things and have different purposes depending upon the timing of their execution in London and delivery in New South Wales. More importantly, the language masks the real purpose of the pre-

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<sup>140</sup> See *Guide to the New South Wales State Archives relating to Convicts and Convict Administration*. (Kingswood, 2006), pp. 19-21.

<sup>141</sup> For an example of one of the last deeds of assignment, see that for the convicts sent to Van Diemen's Land per the transport *Chapman*. The *Chapman* departed England on 6 April 1824 and arrived in Hobart Town on 27 July 1824. Bateson, *The Convict Ships 1789-1868*, pp. 358-9. The text of the deed is set out in the Tasmania Archive and Heritage Office file: Convict assignment lists and associated papers, 1 Jan 1824 – 31 December 1826, CON 13/1/3, p. 131.

1824 indents as being documents of transmission of servitude, not merely a catalogue of the identity and characteristics of the convicts.

On 14 March 1801 the Tory politician Henry Addington replaced William Pitt as Prime Minister of Great Britain. Addington's appointment led to some changes within the Cabinet, some immediate and some a few months later. On 14 March, Henry Dundas was replaced as Secretary of State for war by Robert Lord Hobart in the widened portfolio of War but with responsibility for the administration of the Colonies. The Duke of Portland remained on as Secretary of State for the Home Department until 30 July of that year when he too was replaced by Thomas, Lord Pelham. On 30 September 1801 a preliminary peace agreement with the French Republic was signed in London, ending the immediate demand on the British Treasury to fund the war.

During December 1801, five months after taking office as Secretary of State for the Home Department, Lord Pelham formulated a 'Hears of a plan for the removing and employing convicts both in the hulks and in Botany Bay'. The exact driver behind the plan is unclear, but the text of the Hears of a plan suggested the desire to reduce the costs to the British Government of the existing contractor scheme. However, the Hears of a plan went further than mere budgetary restraint. Whether by intention or unforeseen consequence, the implementation of the plan had the effect of removing the transportation contractor from a central role in the process of transporting convicts from Britain to New South Wales.<sup>142</sup> The plan was short lived. However, a central element of the plan, from the point of view of this thesis, was the decision to use 'ships belonging to Government, and fitted up

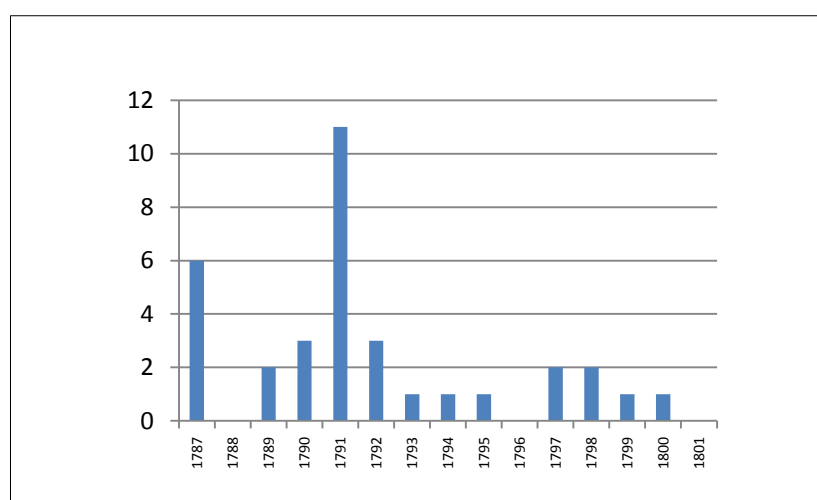
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<sup>142</sup> The Hears of a Plan is set out in *HRNSW*, Volume 4, pp. 635-8.



for that purpose, under the command of King's officers.'<sup>143</sup> In a broader context, Pelham's plan was intended to be even more far reaching. He sought to improve communications between London and New South Wales, while ensuring greater trade, especially on the back-cargo journey from New South Wales to England. By regulating the despatch of convicts on a twice a year schedule, Pelham also sought to ease the burden on the hulks in England, although there did not appear to be pressure from New South Wales for the same changes. Following the despatch of the Third Fleet from England in 1791, subsequent convict shipments were few in number and reasonably evenly spaced. See Figure 3 below for the frequency of convict transports to New South Wales in the period prior to Lord Pelham's proposal.<sup>144</sup>

**Figure 3: Transports from England, 1787 - 1801**



Source: compiled from Bateson, using departure dates of convict transports.

As Secretary of State for the Home Department, Lord Pelham had also sought to intrude himself into the administration of the colony in New South Wales, suggesting the deployment there, on an annual basis only, of troops from 'the East

<sup>143</sup> *HRNSW*, Volume 4, p. 635.

<sup>144</sup> Governor King, governor of New South Wales after 1802, acknowledged Pelham's plan to Lord Hobart; 9 May 1803, *HRNSW*, Volume 5, pp. 112-8, at p. 116.

Indies, either European or Sepoy' which would have the effect of undercutting the role of the officers of the New South Wales Corps and their monopolistic tendencies. More within his own jurisdiction in the Home Department, Pelham even contemplated a more constructive approach to the utilisation of convict labour both in England and abroad, by the formation of 'a separate corps of pioneers or artificers' who could be deployed in naval and military undertakings.<sup>145</sup> Writing in 1805, James Hingston Tuckey, the first mate of *HMS Calcutta* added a further justification for the use of naval ships in transporting convicts to New South Wales to those of 'economy'. As well as maintaining a viable naval service, Tuckey argued that naval officers, who lacked a pecuniary interest in the outcome of the transportation process, would be able to 'keep the convicts in a better state of discipline, and also be more careful of their health by that constant attention to cleanliness, which characterizes the British navy.'<sup>146</sup> Governor King in New South Wales supported this outcome in his letter to Lord Hobart of 9 May 1803.<sup>147</sup>

On 9 March 1802, having already received the approval of George III to the plan, Pelham advised the Lords Commissioners of the Admiralty that, in future, convicts would be sent to New South Wales twice each year in government ships provided by the Admiralty and commanded by 'Officers of the Navy'.<sup>148</sup> Pelham required the preparation of two (or three if needs be) suitable vessels for the purpose to carry between 350-400 convicts, one was to leave England each May and the other each September. Sixteen days later, on 25 March 1802 the treaty of

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<sup>145</sup> *HRNSW*, Volume 4, pp. 636, 637.

<sup>146</sup> James Hingston Tuckey, *An Account of the Voyage to Establish a Colony at Port Phillip* (London, 1802), pp. 2, 3.

<sup>147</sup> *HRNSW*, Volume 5, pp. 112-8, at p. 116.

<sup>148</sup> 1 *HRA* 5, p. 570.

Amiens was signed in France bringing about a formal end to hostilities between Britain and France. This had the effect of freeing up naval vessels and allowing the plan formulated by Lord Pelham to be practicable. On 4 April 1802, Earl Camden, from the Admiralty, advised Lord Pelham that *HMS Glatton* would be prepared for his requirements. Lord Camden also pointed to the present scarcity of timber in Britain and suggested to Lord Pelham that timber could be a suitable back cargo.<sup>149</sup> Pelham gave instructions to the Treasury on 12 May 1802, calling for the proper provisioning of *HMS Glatton*, designating that 270 male and 130 female convicts were to be sent to New South Wales and that forty settlers would join the vessel.<sup>150</sup> Further instructions were given on 2 August 1802 for the loading of convicts from the hulks in London.<sup>151</sup> The full details of the plan to use naval vessels to transport convicts were transmitted to Governor King in New South Wales by Lord Hobart on 29 August 1802. As if to demonstrate Pelham's point about improved communications between London and New South Wales, the correspondence was carried to Sydney on *HMS Glatton*.

On 2 September 1802, the Admiralty issued instructions to Captain James Colnett RN to take charge of the *Glatton* and to proceed to New South Wales. No mention was made of any contract being required by which the property in the service of the convicts on board the *Glatton* was to be addressed. On 6 September, Captain Colnett from *HMS Glatton* at Spithead expressed the wish to Under-Secretary John King at the Home Department, that the necessary 'bonds for the convicts can

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<sup>149</sup> 1 *HRA*, 3, pp. 570-1.

<sup>150</sup> *HRNSW*, Volume 7, p. 752.

<sup>151</sup> See Under-Secretary King (Home Department) to Secretary (of the Admiralty) Nepean: *HRNSW*, Volume 4, p. 804.

be executed here [Spithead]'.<sup>152</sup> The accounts prepared by Thomas Shelton mentioned some documentation, but omitted any reference to deeds of assignment.<sup>153</sup> No mention was made of any bond being prepared. *HMS Glatton* departed Spithead on 23 September 1802 and arrived at Port Jackson on 13 March 1803.<sup>154</sup>

Following the departure of *HMS Glatton* but before the departure of the second naval vessel to carry convicts to Australia, *HMS Calcutta*, the issue of the use of naval vessels in the convict trade was criticised by Jeremy Bentham. Bentham, a philosopher, jurist, and social reformer, was motivated by his ideas for a panopticon, which he proposed to build and operate at a profit in England.<sup>155</sup> Bentham wrote two letters to Lord Pelham on a series of wide ranging issues.<sup>156</sup> The first was in November 1802 and relied upon David Collins's *An Account of the English Colony in New South Wales*.<sup>157</sup> In order to promote the panopticon, Bentham chose to denigrate the penal colonization of New South Wales. Bentham used Collins's remarks as to the lack of the reform of the transported convicts in Sydney to support his argument. Early in 1803, Bentham went further, turning from arguments about the desirability of English based penitentiaries in preference to transporting convicts to New South Wales, to attacking 'the

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<sup>152</sup> *HRNSW*, Volume 7, p. 837.

<sup>153</sup> Shelton's account for the equivalent documentation for *HMS Calcutta* included 6s:8d. for 'Instructions to prepare an Assignment of such Offenders from the Captain to the Governor of New South Wales for the remainder of the Terms of their Sentences'. AO 3/291, folio 268, TNA.

<sup>154</sup> Bateson, *The Convict Ships 1789-1868*, pp. 338-9.

<sup>155</sup> R.V. Jackson, "Bentham V. New South Wales: The Letters to Lord Pelham," in *Working Papers in Australian Studies* (London: Australian Studies Centre, 1978).

<sup>156</sup> Jeremy Bentham, "Panopticon Versus New South Wales: Or the Panopticon Penitentiary System and the Penal Colonization System Compared." J Bowring, ed., *The Works of Jeremy Bentham* (Edinburgh, 1838), pp. 173-211.

<sup>157</sup> David Collins, *An Account of the English Colony of New South Wales*, volume 1 (London, 1798).

enormity committed' on the British Subjects in New South Wales, both the 'innocent' (the free settlers), as well as the 'guilty' (the convicts).<sup>158</sup>

Relevant to this thesis are some of Bentham's observations about the processes of transportation in 1803. In the preface to his *Plea for the Constitution*, Bentham referred to the 'legality' of some of the shipments of convicts from England.<sup>159</sup> In particular, he referred to the recent departures of two of the king's ships; *HMS Glatton* and *HMS Calcutta*. Bentham pointed out that, by law, the captain of these vessels had no 'power' over the 'exiles' than the governor of New South Wales would acquire. Bentham referred to the statute 43 Geo III c. 15, which had been enacted on 29 December 1802.

Whether Bentham's letter to Lord Pelham or some other factor triggered attention to this issue, at some point it must have occurred to someone, either Thomas Shelton at the Old Bailey, or at the Home Department, that the proper processes for transportation were not being implemented. Eleven weeks after the departure of *HMS Glatton*, the Attorney-General, Spencer Perceval, and the Solicitor-General, Sir Thomas Manners-Sutton, were directed by the House of Commons to bring in a bill to 'facilitate, and render more easy, the Transportation of Offenders'. The bill proceeded through the parliament during December 1802 and received Royal Assent on 27 December, as the statute 43 Geo III c. 15.<sup>160</sup> The new legislation was in place when the second naval vessel, *HMS Calcutta*

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<sup>158</sup> Jeremy Bentham, "A Plea for the Constitution:" J. Bowring, ed., *The Works of Jeremy Bentham* (Edinburgh, 1838), pp. 250-284, at p. 276.

<sup>159</sup> Bentham, "A Plea for the Constitution:". Bentham's remarks are set out in the Preface. The Preface is not included in the extract of *A Plea for the Constitution* contained in 4 *HRA* 1, pp. 883-900.

<sup>160</sup> For the progress of the bill see *JHC*, Volume 58 (1802-1803), pp. 79, 87, 94, 96, 101, 113, and 116.

departed Spithead on 28 April 1803 carrying 307 male convicts and settlers bound for Port Phillip.

The effect of the statute 43 Geo III c. 15 was to address the reality of despatching convicts to New South Wales on board ‘his Majesty’s Ships or Vessels’ and the absence of any contract, and therefore of any contractor, through whom property in the service of the transported offenders could be transmitted. The legislation recognised the implementation of the plan introduced by Lord Pelham and the use of naval ships to transport offenders. Where no contract was in existence 43 Geo III c. 15 provided that:

it shall be lawful for his Majesty, by any Order under his Royal Sign Manual, to give, if he shall think fit, to any Person or Persons nominated and appointed for that Purpose in such Order, a Property in the Service of any such Offender or Offenders

How any authority was vested in the King to pass a property right in an offender was neither explained, nor rationalised. The brief statute went on to waive any need for security in such circumstances. The provision concluded by restating that the person nominated to the king, presumably the captain of the naval vessel, acquired property in the service of offenders ‘as if [the nominated person] had contracted and given Security’ in accordance with the statute 24 Geo III c. 58, ‘or any other Law now in force’, which might have been sufficient to apply to transportation from Scotland pursuant to 25 Geo III c. 48. The 1802 statute was not made retrospective and had no commencement date other than the date of royal assent; 27 December 1802. The effect of the legislative regime therefore would have been that the legislative processes failed with respect to the convicts

carried to New South Wales on *HMS Glatton*, but would have applied to those convicts eventually landed in Van Diemen's Land by *HMS Calcutta*.<sup>161</sup>

In the event, the departure of *HMS Calcutta* marked the end of the implementation of Lord Pelham's plan. In mid-May 1803 Britain declared war on the French. The demand for naval access to its own vessels was re-instituted and the formal use of the king's ships ended.

It is now possible to address the second question being considered in this Chapter: how did the 'customary' processes of assigning the services of a transported convict evolve after Governor Hunter's despatch to London in October 1795?

The formal processes developed in London in order to assign property in the service of the offender to the governors of New South Wales evolved from the direct participation of Thomas Shelton to Shelton orchestrating the assignment through the specific deeds of assignment. The sole rationale for the highly structured process was to pass property in the service of the offender. Without a complete assignment, as Jeremy Bentham pointed out in 1802 and Francis Forbes was to point out in 1837, transported convicts were banished but, technically, did not enter into servitude or, in Forbes's, words, convicts 'on being banished, would become free.'<sup>162</sup> With occasional exceptions, the evidence demonstrates the successful assignment of property in the service of the offender to the governors after 1795. But the processes examined in this Chapter referred only to convicts transported from England. The circumstances of convicts transported from Ireland

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<sup>161</sup> Bentham, "A Plea for the Constitution:", pp. 251-2. Bateson placed the departure of the *Calcutta* as 23 April 1803; Bateson, *The Convict Ships, 1789-1868*, pp. 370-1.

<sup>162</sup> Forbes to the House of Commons Select Committee on Transportation; 14 April 1837, House of Commons Parliamentary Papers 1837 (518), Para. 93, pp. 7-8.

and Scotland created different problems with respect to assignment and the resulting status. These are examined separately in Chapter 5 (Ireland) and Chapter 6 (Scotland).



## Chapter 5: Transportation from Ireland

The punishment of transportation was not solely the invention of the English criminal justice system in the seventeenth century. Within the British Isles, two other systems of transportation were in operation and, for much of the time, overlapped. This chapter will briefly consider the practices of transportation from Ireland while the next chapter will consider the position in Scotland. The intention here is to consider how transportation evolved in both countries, not by way of developing appropriate histories in themselves – although that has been necessary in order to provide context – but in order to examine how the status of offenders transported from either country may assist in understanding what was meant in the English act 4 Geo I c. 11 and its use of the formula, ‘property in the service of the offender’. The Irish transportation material is considered through three questions: first, what were the origins of transportation from Ireland? Second, how did Ireland deal with the status of transported offenders? Third, how did Irish law deal with the status of offenders transported to the Australian colonies?

Transportation from Ireland has not been widely examined in the literature. AE Smith and PW Coldham both carried out detailed examinations of involuntary migration from the British Isles to America.<sup>1</sup> Smith’s focus was on bonded servants migrating to America in the period before 1776. The transportation of convicts from Ireland and Scotland are added more as after notes for completeness. Smith’s examination of the criminal justices regime is, correspondingly, brief. Coldham’s examination is both more anecdotal and judgemental, preferring instead to examine the roles of individual convicts, as

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<sup>1</sup> Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (New York, 1971), and Peter Wilson Coldham, *Emigrants in Chains: A Social History of Forced Emigration to the Americas 1607-1776* (Baltimore, 1992).

opposed to the legal regime. AGL Shaw's interest, despite the breadth of his title, is concerned with transportation to Australia: transportation from Ireland under Irish law is limited to a paragraph and a footnote.<sup>2</sup> Roger Ekirch examined the social origins of the transported convicts. In doing this Ekirch examines the demographic data about convicts, including those from Ireland who made up about one-quarter of the entire transported population from the British Isles before 1775.<sup>3</sup> Transported convicts form the centrepiece of Ekirch's work; while the legislative regimes are identified, they are not examined in any detail. Morgan and Rushton's most recent material, points to the difficulty in differentiating between 'voluntary, forced and judicial processes' in Ireland, concentrates on military rather than civil transportation and pays little attention to the judicial processes or the status of transported Irish offenders.<sup>4</sup>

Two works devoted to transportation from Ireland before 1800 make greater contributions to the literature. Audrey Lockhart set out a brief overview of the Irish eighteenth century transportation legislation in her 1976 published thesis *Some Aspects of Emigration from Ireland to the North American Colonies between 1660 and 1775*.<sup>5</sup> Lockhart's examination is purely Irish in context, listing the principal items of Irish legislation and identifying some anecdotal evidence of the types of convicts transported and their reception in the American colonies.

Bob Reece's *The Origins of Irish Convict Transportation to New South Wales*

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<sup>2</sup> AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire*, (London, 1966), p. 36.

<sup>3</sup> Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford, 1987), p. 46-7

<sup>4</sup> G Morgan and P Rushton, Chapter 4, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves*, (London, 2013), pp. 59-80, covers the transportation of rebels from Ireland, as well as from England and Scotland. See also p. 61.

<sup>5</sup> Audrey Lockhart, *Some Aspects of Emigration from Ireland to the North American Colonies between 1660 and 1775*, ed. Lawrence J McCaffrey, *The Irish-Americans* (New York, 1976), pp. 80-96

published in 2001 is more substantial.<sup>6</sup> Reece's subject is the period between the American War of Independence and early transportations to New South Wales. In setting the scene for his analysis, Reece canvassed principal items of the Irish transportation regime, but not in any detail. Reece's history of the Irish attempts to send convicts to various parts of Canada, a cheaper alternative to New South Wales, is illuminating. Reece makes no comparative analysis of the British and Irish transportation regimes.

Two works bridge the gap between writing on Irish transportation specifically and the Irish criminal justice system generally: both are by the Irish legal historian Neal Garnham. His first work, published in 1996, is a detailed analysis of some assize hearings in Ireland, from which he draws a number of conclusions about the Irish criminal justice system.<sup>7</sup> His attention to transportation is fairly general, being more concerned with the process of the courts and their administration. More relevant to this thesis is his 2001 chapter on criminal legislation in the Irish parliament.<sup>8</sup> In this work Garnham examined the utility of making comparisons between Irish and English/British legislative outputs regarding criminal justice. In the process, he comments usefully on the character of the Irish political and legal structures and the development of Irish criminal justice legislation. The work in this chapter will, in effect, exemplify Garnham's thesis of differentiation of the British *versus* the Irish legislative approach, with useful implications for the principal research questions being considered in this thesis.

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<sup>6</sup> Bob Reece, *The Origins of Irish Convict Transportation to New South Wales* (Basingstoke, 2001).

<sup>7</sup> Neal Garnham, *The Courts, Crime and the Criminal Law in Ireland 1662-1760* (Blackrock, Co. Dublin, 1996).

<sup>8</sup> Neil Garnham, "Criminal Legislation in the Irish Parliament, 1692-1760," in *The Irish Parliament in the Eighteenth Century: The Long Apprenticeship*, ed. D Hayton (Edinburgh, 2001).

While the focus of this thesis is on the practices of transportation from England, it is useful to pay some attention to the practices adopted by the Irish government during the eighteenth century, not for their intrinsic value alone, but for the light they are able to shed upon the meaning and usage of the legislative framework current in England.<sup>9</sup> This is possible because of one aspect of the operation of what was known as Poynings' Law, an old Irish law which had curtailed the power of the Irish Parliament to pass only those laws which were approved by the British government. The operation of Poynings' Law and its relevance to this thesis will be considered shortly.

The operation of a separate Irish transportation regime during the eighteenth century enables useful comparisons to be made between the English and Irish regimes, while allowing for the differences between English and Irish circumstances and the origins of the respective legislation. A number of relevant antecedent considerations brought about these circumstances. Both regulatory frameworks used the English language, and both operated in the same legal context of English common law, modified by acts of the respective parliaments. Many of the judicial positions in the Irish courts were filled by Englishmen and Irish lawyers were required to spend time in England as a part of their training.<sup>10</sup> At relevant times, some members of the Irish parliament were also members of the parliament in Westminster.<sup>11</sup> Additionally, the operation of Poynings' Law resulted, on occasions, in English legislation being utilised as the basis for Irish

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<sup>9</sup> England united with Scotland in 1707. While it is jurisdictionally correct to refer to the government and parliament in Westminster as 'British', the British transportation legislation until 1766 applied only to England.

<sup>10</sup> Garnham, "Criminal Legislation in the Irish Parliament, 1692-1760", p. 61.

<sup>11</sup> Garnham, "Criminal Legislation in the Irish Parliament, 1692-1760", p. 61.

statutes.<sup>12</sup> The close affinity between the laws and the English and Irish criminal justice systems open up the possibility of useful comparative analyses of the intentions and understanding of the legislative regimes on either side of the Irish Sea relevant to this thesis.

Turning to the first question to be considered in this Chapter: what were the origins of transportation from Ireland?

On 4 March 1703 the Lord Lieutenant of Ireland, James Butler, Duke of Ormond, gave royal assent to a bill for *An Act for the reviving an Act for taking away Benefit of Clergy in some Cases: and for transporting Felons*.<sup>13</sup> This legislation began the kingdom of Ireland's ninety-six year long experience with legislatively sanctioned transportation. The number of men and women transported under the purely Irish transportation regime has not been accurately calculated, but is estimated to have been in the vicinity of 13,000.<sup>14</sup> On 1 January 1801, the kingdom of Ireland merged into a parliamentary union with Great Britain.<sup>15</sup> Union did not put an end to different rules applying to transportation from Ireland, however. Post-Union transportation from Ireland is examined briefly at the end of this chapter.

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<sup>12</sup> Garnham, "Criminal Legislation in the Irish Parliament, 1692-1760", p. 61.

<sup>13</sup> Irish 2 Anne c. 12. Ireland used its own regnal year citations for statutes. In order to differentiate English and Irish legislation in this Chapter, where appropriate Irish legislation will be cited thus - Irish [citation].

<sup>14</sup> Ekirch, *Bound for America*, p. 25. Ekirch's calculations do not cover the period from 1703 to 1718.

<sup>15</sup> The Irish statute enabling the Union was 40 Geo III c. 38.

During the period 1695 to 1800 the Irish parliament passed at least twenty-three statutes on the subject of transportation.<sup>16</sup> The principal statutes are listed in Appendix 3. Of the fifteen transportation acts made prior to the amelioration of Poynings' Law in 1782, all but two originated through the heads of bill procedure. Of those same fifteen statutes all but three were amended in London, presumably on the recommendation of the British law officers. It is also apparent from Appendix 3 that even though the effects of Poynings' Law was reduced in 1782, Irish legislation still required approval in London before being given royal assent by the Lord Lieutenant in Dublin. The overall effect of these various legislative moves was to set in place and maintain a more or less uninterrupted scheme of transportation, which endured until around 1775 when the combined effect of the interruption of transportation brought about by the American War of Independence and the expiry and non-continuation of earlier, but expiring, legislation supervened.

Prior to 1719 the Irish parliament made only experimental and uncoordinated use of the punishment of transportation. Laws of 1695 and 1697 outlawed 'tories, robbers, and reapparees'. In 1703 such offenders became liable to transportation, along with people convicted of some lesser forms of felony. Over the next seven years these new arrangements were adjusted and, in part, repealed so that by 1710 the position of 1703 had been restored. These developments are summarised in Table 8.

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<sup>16</sup> A further seven bills failed to complete the process; usually these lapsed within the parliament. See Queen's University Belfast legislative database (hereinafter 'QUB Db') [http://www.qub.ac.uk/ild/?func=simple\\_search..](http://www.qub.ac.uk/ild/?func=simple_search..)

**Table 8: Summary of Irish Transportation legislation prior to 1719**

	Year and regnal year citation	Mischief or target
1.	1695: 7 Wil III c. 21	The suppression of tories (bandits)
2.	1697: 9 Wil III c. 9	Better enforcement of 7 Wil III c. 21
3.	1703: 2 Anne c. 12	Applied to two types of offences: theft of not above 2 cows, not above 10 sheep, not above 20 shillings (Repealed in 1710); and harbouring. tories, robbers, or reapparees. First use of transportation from Ireland as a punishment
4.	1703: 2 Anne c.13	Extended the operation of 7 Wil III c. 21 and 9 Wil III c. 9 for a further seven years
5.	1707: 6 Anne c. 11	'loose, idle vagrants and people pretending to be Irish gentlemen (i.e. people who are wandering about demanding victuals) and loose persons of infamous lives and character
6.	1710: 9 Anne c. 6	Repealed 2 Anne c. 12 except for those provisions regarding the harbouring of tories, etc.

**Source:** *The statutes at large, passed in the Parliaments held in Ireland: from the third year of Edward the Second.* (20 Vols. Dublin 1783-1801)

Some general conclusions can be drawn from the approach to transportation adopted by the Irish parliament during the period 1703 to 1710 apart from the hardening attitude towards Tories. First, legislation invoking transportation as a punishment lacked any consistent approach.<sup>17</sup> Second, the Irish parliament was always conscious of the delegated nature of the roles of the stakeholders in the criminal justice system and set out the responsibilities of those stakeholders with much greater particularity than the comparable contemporary British legislation. In so doing, the Irish legislation demonstrated a clear understanding of the concept of custody of the offender that was left unstated in the contemporary British legislation. Third, the Irish parliament did not adopt the contemporary British measures of equating the transported offender, once in America, to the role of a servant; the status of Irish offenders was left undefined. Fourth, the issue of the cost of sending Irish offenders undergoing transportation to a port, and then to

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<sup>17</sup> This lack of consistency in approach is reminiscent to the period of the Long parliament of Charles II in England during the seventeenth century considered in Chapter 2.

America, was clearly identified, as was the need for shipping contractors to produce security. Finally, the Irish parliament combined the punishment both of lesser felons and vagabonds (identified in 1707 as ‘vagrants’) into the same statutory process, unlike the position in England where separate legislation was used for the different categories of offence until 1744.<sup>18</sup>

One final general observation about the pre-1719 Irish regime should be noted. The mechanics of transportation set out in the statute of 1703, while detailed in content, appeared to be home-grown. In 1707 the Irish parliament clearly looked to the contemporary British practice of transportation or impressment in the Royal Navy. This device appears to have been copied from the English statute of 1703, 2 & 3 Anne c. 6 and would have had the additional benefit, to the Irish authorities at least, that the cost of maintenance thereafter of an offender taken aboard a British vessel would have passed to the Royal Navy.<sup>19</sup>

The sheriff of the seaport town that accepted final custody of an offender under order of transportation was required to find a merchant prepared to ship the offender to America. This would have entailed a more complicated transaction than would have been necessary in England, where shipping contractors involved in traffic across the Atlantic would have been common. In England the role was undertaken by the clerk of the court. The argument that English navigation laws restricted the ability of Irish mariners and shipowners to compete with English ships has recently been criticised.<sup>20</sup> But whether there was an Irish home-grown

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<sup>18</sup> See reference to 17 Geo III c. 5 mentioned in Chapter 4.

<sup>19</sup> Whether transported Irish offenders were ever put aboard naval vessels is not clear.

<sup>20</sup> R. C. Nash, "Irish Atlantic Trade in the Seventeenth and Eighteenth Centuries", *The William and Mary Quarterly*, 42 (1985) p. 329. Nash suggests that the effect of the navigation acts on Irish



merchant navy capable of shipping transported offenders to America is not clear. The additional requirement of the Irish statute 2 Anne c. 12 that the merchant provided security of £20 for each transported offender ‘landed’, would have made the sheriff’s task no easier. The statute remained silent on what the merchant, or the offender, was to do once the offender reached America. The implication must have been that the merchant would have done whatever British merchants would have done with English offenders transported to America; that is that the offender, or at least the offender’s services, would be sold into the colonial American labour market.

As indicated in Table 8, the provisions of the statute 2 Anne c. 12 were short-lived. In 1710 a further Irish statute, 9 Anne c. 6, repealed the provisions of the 1703 statute insofar as they applied to lesser forms of felony.<sup>21</sup> Thereafter the statute was only to invoke the punishment of transportation for people harbouring tories, robbers, and reapparees. The end result of these legislative arrangements was that, in the period after 1710, two statutes applied transportation as a punishment in Ireland; 2 Anne c. 12 (1703) in so far as it continued to apply to tories, robbers, and reapparees, and 6 Anne c. 11 (1707) applying to ‘loose, idle vagrants’, people pretending to be Irish gentlemen, and ‘loose persons of infamous lives and character’.

With the origins of transportation from Ireland now set out, it is possible to turn to the second question to be considered in this Chapter: how did Ireland deal with the status of transported offenders?

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trade was not as restrictive as earlier authors had considered. But Irish shipping to America never reached the volumes of the English trade and consequent shipping movements.

<sup>21</sup> Irish statute 9 Anne c. 6.

Of the twenty-two Irish statutes on transportation, however, only two are directly relevant to this thesis. The operation of transportation from Ireland underwent a major reformulation as a result of Irish legislation in 1719 and 1725. The major reformulation was comparable to the changes in Britain brought about by the British statutes; 4 Geo I c. 11 of 1717 and 6 Geo I c. 23 of 1719. While the British and Irish approaches were similar, there were significant differences. The reformulated Irish regime was to remain in effect until the end of transportation. Three transportation statutes were passed by the Irish parliament during the period 1719 to 1725. These are listed in Table 9.

**Table 9: Irish transportation legislation between 1719 and 1756**

	Year and regnal year citation	Mischief or target
1	1719: 6 Geo I c. 12	Existing laws were ineffectual and pardoned offenders were not proceeding to transportation
2	1721: 8 Geo I c. 9	A repeat of the above
3	1725: 12 Geo I c. 8	Overcrowded gaols and masters of vessels unwilling to bear the costs of transportation.

**Source:** *The statutes at large, passed in the Parliaments held in Ireland: from the third year of Edward the Second, ...* (20 Vols. Dublin 1783-1801)

Whether the positive effects of the introduction in England of the statute 4 Geo I c. 11 were noticed in Ireland, or whether Michael Tisdall, a member of the Irish House of Commons and member for Ardee, took an interest in such matters is unclear. On 3 July 1719 Tisdall was given leave by the Irish House of Commons to introduce a heads of bill into entitled: *For the better and more effectual apprehending and transporting of felons and others, and for continuing and amending several laws made in this kingdom for suppressing tories, robbers and*

*repparees*.<sup>22</sup> According to the (British) Treasury Warrants for 1717, Michael Tisdall was the advocate general and judge martial of Ireland, which may have given him some interest in these matters.<sup>23</sup> Tisdall appears to have displayed some interest in criminal justice legislation during his tenure in the Irish Parliament between 1713 and 1726.<sup>24</sup> Whether Tisdall can be considered an Irish Sir William Thomson is an open question.

Tisdall's heads of bill passed through the Irish House of Commons by 7 August 1719 whereupon Tisdall was ordered to take the heads of bill to the Lord Lieutenant and 'desire that the same may be transmitted to Great Britain in due form.'<sup>25</sup> The bill was then approved by the Irish Privy Council and sent to London where it was first received on 3 September 1719 and sent to the 'Right Honourable the Lords of the Committee for the Irish Bills' who, in turn, referred the bills to the law officers.<sup>26</sup> At the time these officers were; the Attorney-General for England and Wales—Sir Nicholas Lechmere (incumbent from 18 March 1718 to 7 May 1720) and the Solicitor General for England and Wales—

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<sup>22</sup> In the QUB Db this Bill is referenced No. 4044. Tisdall had introduced a bill *For the more effectual sending beyond the sea such as by law are to be transported, and to prevent the return of such who shall be transported* on 19 December 1713 which did not proceed. It is an interesting question whether this bill anticipated the English legislation of 1717. Without access to the text of the bill it is not possible to reach any conclusion.

<sup>23</sup> 'Treasury Warrants: June 1717, 15-20', in *Calendar of Treasury Books, Volume 31, 1717*, ed. William A Shaw and F H Slingsby (London, 1960), pp. 374-379 <http://www.british-history.ac.uk/cal-treasury-books/vol31/pp374-379> [accessed 24 December 2015].

<sup>24</sup> The QUB Database identifies six legislative initiative of Tisdall. Of these, three touched on the subject of transportation: these were: First, in 1713: measure not enacted: bill for *Transportation overseas*. It is interesting to speculate whether this bill resembled Tisdall's text of 1719. If so, it raises interesting possibilities about whether Thomson was aware of Tisdall's approach and whether Thomson utilised Irish elements into his own text in England, or whether the English bill was of Irish origin. Second, in 1719: the heads of bill that became 6 George I c.12 Transportation of felons, and suppression of tories and rapparees; and third, in 1721, heads of bill that became 8 George I c. 9 Transportation of felons, suppression of tories and rapparees, and enlistment in foreign service.

<sup>25</sup> *Journals of the House of Commons of the Kingdom of Ireland*, (hereinafter *JHCKI*), Volume 3 (1719), p. 213.

<sup>26</sup> Privy Council Registers PC 2/86, pp. 312-3, TNA.

Sir William Thomson (incumbent from 24 January 1717 to 17 March 1720).<sup>27</sup>

However, on 15 September 1719, along with half-a-dozen other bills, the initial referral was 'discharged and made void'. The minute continues:

And their excellencies are hereby further pleased to order that the said bills ... be, and they are hereby, referred to Mr Attorney General (Lechmere) to examine the same, who is to take to his assistance (if he thinks fitting) any of his majesty's counsel learned in the law now in town for the more speedy dispatch of the said bills.<sup>28</sup>

The omission of the Solicitor-General in the reference is not explained. On 24 September 1719 the committee on the Irish Bills reconvened. The minute noted, 'Their Lordships have mett (sic) and considered the same and taken the opinion of Mr Attorney General thereupon.'<sup>29</sup> Somewhat enigmatically, and without any explanation as to the internal contradiction, the minute recorded 'the following alterations and amendments proper to be made to the said Bills, Viz:

As to the Act for the better and more Effectual Apprehending and transporting of felons and others, and for continuing and amending, several lawes made in this Kingdom for Reppressing Tories, Robbers & Repparys, their Lordships humbly conceive this Act may pass without amendment.

Michael Tisdall's heads of bill had been approved by the British Privy Council without amendment after consideration by Sir Nicholas Lechmere and, possibly, others. Whether Sir William Thomson, the putative author of the parallel English legislation of 1717, had a role in this consideration is unclear. Tisdall's bill was returned to the Irish House of Commons on 13 October 1719 for formal passage through the Irish parliament. The bill passed through the House of Commons by

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<sup>27</sup> Dates of incumbency are drawn from Oxford Dictionary of National Biography and the History of Parliament Online. Websites: <http://www.oxforddnb.com/>; and [www.historyofparliamentonline.org](http://www.historyofparliamentonline.org).

<sup>28</sup> PC 2/86, pp 316-17, TNA.

<sup>29</sup> *Ibid*, pp. 333-4. The meeting had originally been scheduled to be held the previous day, 23 September, but was adjourned.

27 August 1718.<sup>30</sup> The bill went to the Lords where it was approved on 27 October and received royal assent on 2 November 1719 as Irish statute 6 Geo I c. 12.

It is speculation to consider whether the relationship between Lechmere and Thomson in London had an impact upon the different directions taken with regard to the status framing mechanisms of the English and the Irish transportation legislation. As mentioned in Chapter 3, the evidence suggests that Thomson had a direct influence upon the shape of the English legislation. JM Beattie followed this line in 1989 but was even more supportive of it in 2001.<sup>31</sup> It is also speculation to argue that the 'property and interest in the service of the offender' provision arose from the circumstances faced by Sir Thomas Johnson following the Jacobite surrender at Preston and the need to remove the necessity of offenders having to sign indentures prior to their deportation. By the time the Tisdall's heads of bill arrived in London for the approval of the English Privy Council in September 1719 Thomson and Lechmere may have already been on a personal collision course. According to the evidence before the House of Commons leading up to Thomson's dismissal as Solicitor-General six months later in March 1719, Thomson had been concerned with Lechmere's conduct in accepting fees for Crown services and had been watching the activities of Lechmere for some months. When Tisdall's heads of bill was first considered by the Privy Council in London it was sent to the Attorney-General, albeit the more senior of the two law officers of the crown but, if the 1717 experience of

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<sup>30</sup> The dates for the passage of the bill through the Irish parliament are drawn from the QUB Database.

<sup>31</sup> JM Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford, 2001), p. 428.

Thomson is correct, then the less well qualified of the two, to examine the proposed Irish legislation. One other explanation is that on 1 July 1718 Lechmere had been appointed to be a member of the Privy Council, which would have given him both a social as well as professional seniority over Thomson. Whether Thomson joined the group to work with Lechmere's review of Tisdall's heads of bill is not clear. This leaves open the further possibility that Lechmere, having been aware of the approach taken in the formulation of 'a property and interest in the services of the offender' formula contained in the British statute 4 Geo I c. 11, considered such a provision in an Irish statute either unnecessary or of no consequence. During his earlier career in parliament Lechmere had maintained an interest in Scottish affairs and may have realised the difficulties surrounding what would now be considered conflict of laws.<sup>32</sup> Given the subordinate status of the parliament of Ireland, Lechmere may well have thought it unnecessary for there to be conformity between the English and Irish legislation because it would have been beyond the competence of the Irish parliament to pass laws which operated outside of Ireland. This would have been inconsistent with the extension of 4 Geo I c. 11 to America per clause XII of the latter statute.

Bob Reece adopted the view that the 1719 Irish statute was 'based on the key British legislation of 1718,' which, as will be demonstrated below, is only partly true.<sup>33</sup> Neil Garnham's consideration is more apposite. From his general analysis of the practices of the Irish Parliament in attempting to replicate English criminal

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<sup>32</sup> Romney Sedgwick, ed., *History of Parliament: The Commons 1715-1754*, volume 2, (London, 1970), pp. 202-4.

<sup>33</sup> Reece, *The Origins of Irish Convict Transportation to New South Wales*. Reece's comments were by way of introduction only and did not attempt to provide a full analysis.

legislation, Garnham pointed out: ‘Yet it would be misleading to see the Irish parliament as a merely plagiaristic body’. He explained:

English and British legislation transplanted into Ireland rarely emerged unadulterated from the Irish parliamentary process. In some cases pre-existing variations in the law in the two kingdoms necessitated adoption and qualification of new legislation. Although existing British legislation provided readily accessible patterns for the use of the Irish parliament, these were not seen as inviolable. The Irish parliament displayed a readiness to adapt, amend, and modify the productions of the imperial parliament before introducing them to Ireland.<sup>34</sup>

As will be demonstrated, nothing could better describe the legislation that emerged from the Irish Parliament in November 1719.

Two aspects of the passage of Tisdall’s heads of bill through the Irish Parliament suggest a more refined process than normally mentioned in the literature on the institution.<sup>35</sup> First, a heads of bill only had to complete its passage through the house in which it was introduced before being sent to the Lord Lieutenant for examination by the Irish Privy Council and despatch to England. As happened in the case of Tisdall’s 1719 heads of bill, when it was returned to Dublin for passage through the Irish parliament, there was no capacity on the part of the other Irish house (in this case the House of Lords) to amend the bill – in effect therefore the bill was the legislative product of the one house only. Second, and in amplification of the first aspect, the House of Lords appears to have adopted the practice of ensuring that the final bill was identical to that approved in London.<sup>36</sup> Ironically, therefore, the House of Lords, seemingly oblivious of the irony, was reinforcing its own exclusion from the legislative process.

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<sup>34</sup> Garnham, "Criminal Legislation in the Irish Parliament, 1692-1760," p. 62.

<sup>35</sup> See, for example, RB McDowell, *Ireland in the Age of Imperialism and Revolution 1760-1801*, (Oxford, 1979), p. 131.

<sup>36</sup> *Journals of the House of Lords of the Kingdom of Ireland* (hereinafter *JHLKI*), Volume II, (1719), pp. 674-5. Reel 14

A close examination and comparative analysis of both the British and Irish texts is instructive, particularly in interpreting the British 1717 legislation. While interesting in itself, the Irish legislation is examined here by way of contrast to its English equivalent. A detailed comparative analysis of both texts is set out in Appendix 9. A brief summary of that analysis follows.

The Irish statute set out three reasons for its enactment which echo the justification for the British statute two years earlier. First, it recited that the punishments inflicted by existing laws for robbery and felony ‘have not proved effectual to deter wicked and ill disposed person’. Second, it referred to offenders ‘to whom royal mercy has been extended on condition of transporting themselves to the West-Indies, have often neglected to perform the same’ and have abused the mercy shewn.<sup>37</sup> Third, and more pragmatically, the recital pointed out as a result of the first two abuses, the gaols were full, which provided no deterrent to others and put the cities and counties ‘to great charge’. No mention was made of ‘want of servants’ in America. As in the British statute, this was the first legislative formulation in Ireland of conditional pardons being utilised by the executive as an initiating process to transportation.

The Irish legislation only addressed two situations relating to the use of transportation; a punishment applying to those within the benefit of clergy, and those excluded from benefit of clergy. For reasons that are not clear from the text of the statute alone, the Irish statute reversed the order in which the two different matters were considered. The Irish statute did not include a provision equivalent to Section II of the British statute which addressed some of the consequences of

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<sup>37</sup> This would appear to have been a lift from the English legislation and the problems faced by Sir Thomas Johnson and the convicts who escaped, for a short while, in Ireland.



transportation and which are considered below. Less problematic was the non-inclusion of an Irish equivalent to the use of indentures to send vagrant youths between fifteen and eighteen years of age from London to serve for eight years in America along the lines set out in Section V of the British Act.

The Irish treatment of offenders ‘intituled to the benefit of clergy’, set out in Section III, invoked almost identical wording to that used in the British statute. The only point of difference came at the end of the Irish provision. The British statute had invoked the formula, that the sentencing Court:

shall have power to convey, transfer and make over, such Offenders, by Order of the Court, to the Use of any Person or Persons who shall contract for the Performance of such Transportation to him or them, and his and their Assigns, for such Term of seven years

The Irish statute used identical wording, but added the words: ‘to commence from the time of the offenders landing in America.’

The Irish treatment of offenders who were excluded from clergy closely followed the British precedent, allowing for the different means by which pardons were awarded in the two kingdoms: by his Majesty, etc., in England, and by the ‘chief governor of governors of this kingdom’.<sup>38</sup> The Irish provisions also included into the process those offenders for whom transportation had already been ordered. This provision cannot have intended to apply to vagrants, for whom issues of benefit of clergy would not have been relevant. It can be concluded therefore that it can only to have applied to tories, robbers, and repparees already under sentence.

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<sup>38</sup> Irish 6 Geo I c. 12, section I.

It is clear from the wording of the Irish statute that the processes to be applied to the transportation of offenders excluded from clergy had been based on the British statute. But there were two further differences. In the British statute, the power of the trial judge rested upon the prior issue of a conditional pardon to a convicted felon. The order for transportation therefore was being handed down as a bar to further judgement. In the Irish statute, the intervening and immediate power of the trial judge was more straightforward; the Irish assize judges were themselves dispensing the conditional pardon, which was followed up by their capacity to issue the warrant for transportation.

The further difference between the British and Irish statutes lay in the nature of the relationship between the transported offender and the shipping contractor undertaking the shipment to America. This point of difference goes to the central research question being examined in this thesis. The British formula, referring to the shipping contractor, concluded with the words:

And such Person or Persons so contracting, as aforesaid, his or their Assigns, by virtue of such Order of Transfer, as aforesaid, shall have a Property and interest in the service of such Offender for such Term of Years.

The Irish provision merely reflected the processes that had to be implemented to send the offender to America. The duties and responsibilities of the sheriff and the magistrates in the port-towns were stated with an emphasis on the obligations to maintain security and to enter into a contract to carry the offender to America. The Irish statute was silent on the nature of the rights, if any, acquired by the shipping contractor with regards to the transported offender. Put another way, the Irish statute 6 Geo I c. 12 did not create a statutory property in the service of the

offender. But the matter was not left silent; Section I of the Irish statute concluded in the following terms:

and, after such contract made, such offenders shall be transferred and conveyed by the said magistrate or officer to such other person or persons, and to his or their assigns, to be by them transported; he or they entering into a recognizance of the sum of fifty pounds, the condition of which shall be that such offenders, so made over to them as aforesaid, shall be transported.

As mentioned above, the Irish statute contained no equivalent provision to Section II of the British statute, with mixed results. In essence, Section II canvassed the efficacy of a sentence of transportation by reference to three separate outcomes. The first outcome related to early return and provided that an offender who returned ‘into any Part of Great Britain or Ireland’ before the expiry of the term of transportation was to be punished as a felon, without benefit of clergy. This provision was carried into the Irish statute as a stand-alone Section 4, although it had already existed in earlier Irish legislation.

The second outcome addressed in the British statute (although it set out as the third item of Section II) was that, if a transported offender ‘shall have served their respective Terms, according to the Order’ of transportation:

such Services shall have the Effect of a Pardon to all Intents and Purposes, as for that Crime or Crimes for which they were so transported, and shall have so served, as aforesaid.

The omission of this part of Section II in the Irish legislation left open the entire consequence of a completed sentence of transportation. This was compounded by the omission of any general statement of the length of any term. This was left to the court at the time of sentencing. The implication from the wording of both statutes then is that the Irish parliament (more probably Michael Tisdall) had the

precedent of the British statute available, but chose instead to take a different course.

The Irish statute 6 Geo I c. 12 concluded with a number of administrative measures which were not included in the British legislation. It went on to extend for seven years, the operation of earlier Irish statutes targeting tories, robbers and repparees, i.e. the statutes 7 Wil III c. 21 of 1695, 9 Wil III c. 9 of 1697, and 9 Anne 11 of 1707. The statute 6 Geo I c. 12 itself had no termination date.

The scheme of the 1719 Irish statute needed adjustment within two years. In 1721 a further statute, 8 Geo I c. 9, addressed a range of enforcement issues. Reciting that the existing laws had ‘not proved effectual’, 8 Geo I c. 9 sought to improve the enforcement of the laws against offenders who had been ordered to transportation, but, for whatever reasons, remained at large in Ireland. Such offenders were to be deemed guilty of felony without benefit of clergy. To ensure ‘that such convictions may be with as little trouble and expence as possible’, trials could be held where the offender had been apprehended and proof of prior prosecution could be adduced in evidence by means of a certificate from the original trial court.<sup>39</sup> The statute then went on to set out a series of measures designed to improve law enforcement in Dublin and elsewhere by offering rewards for the successful prosecution of the perpetrators of crime.<sup>40</sup>

Complementary measures were also addressed, as was the problem of ‘fugitives from justice’ in England being apprehended in Ireland, but who could not be returned to England because ships’ masters refused to carry them. In future, in return for payment of between 40/- and £5, and at the order of the Lord Lieutenant

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<sup>39</sup> Section II.

<sup>40</sup> Section III.

or a justice of King's Bench, a master could be compelled to carry up to two fugitives back to England.<sup>41</sup>

So having considered the status of offenders transported from Ireland in accordance with the 1719 statute 6 Geo I c. 12, it is now appropriate to consider the second question to be considered here: how then did Irish law deal with the status of transported offenders?

By 1725 further improvements were required to the 1719 regime. As if nothing had happened since 1719, the parliament complained:

Whereas great numbers of persons are confined in the several goals (sic) of this kingdom, who by virtue of the statutes now in force are to be, or ought to have been, transported unto some of his Majesty's plantations in America<sup>42</sup>

The cause of this problem, the parliament alleged, was the ships' masters were unwilling to bear the expense of transporting offenders to America. The solution, by means of different arrangements from those utilised in the British statute of 1719, though probably to the same effect, was to allow subsidies to be paid to shipping contractors. These provisions were incorporated in the Irish statute 12 Geo I c. 8. The chief magistrates in port towns were authorised to contract with any person to transport offenders to America and obtain securities for proper performance. In England, the contract was established by the clerk of courts. 'For the encouragement of those who shall contract', subsidies were to be paid; for each capital felon, forty shillings, and for other offenders, twenty shillings.<sup>43</sup> The cost of the subsidy was to be met by the relevant grand jury of the place where the

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<sup>41</sup> Sections VII-IX.

<sup>42</sup> 12 Geo I c. 8.

<sup>43</sup> Section II.

offender was sentenced.<sup>44</sup> The English rate, set by the Treasury and not by statute, was a uniform £3 from 1717, irrespective of the status of the offender.<sup>45</sup>

The unique element of the 1725 Irish scheme, however, was the requirement that a transported offender was not to leave Ireland without having first signed an indenture. This had no parallel in the British legislation, although it reflected an alternative statutory response to the difficulties faced by Sir Thomas Johnson in Liverpool in 1716. The bill for this statute had originated in the Irish House of Commons as a heads of bill in December 1725 at the motion of the Attorney-General for Ireland. The approved bill was sent to London and was amended by the British Privy Council at the end of January 1725. It finally received royal assent in Ireland in March 1725.<sup>46</sup> The scheme contained within the statute requires close examination because it touched directly upon the treatment of the labour of a transported Irish offender. Section V of 12 Geo I c. 8 was multi-layered, and operated along the following lines.<sup>47</sup> As part of the transportation contract, it was envisaged that the chief magistrate would agree upon a form of ‘articles, covenant, or indenture’ with the person contracting to undertake the transportation. The statute indicated that under this arrangement no offender would be obliged to serve ‘for any longer term than seven years’.<sup>48</sup> The implication then was that an offender about to be transported would, as a pre-condition to being sent to America, be required to ‘sign and seal’ the ‘articles,

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<sup>44</sup> Section IV.

<sup>45</sup> Smith, *Colonists in Bondage*, p. 114-4. The amounts paid by the British Treasury were increased to £4 in 1721 and to £5 in 1727

<sup>46</sup> QUB Db [http://www.qub.ac.uk/ild/?func=display\\_bill&id=113](http://www.qub.ac.uk/ild/?func=display_bill&id=113). The law officers of the crown then were; the attorney general Sir Philip Yorke, (later earl of Hardwicke) and solicitor general Sir Clement Wearg. QUB Db uses the Gregorian calendar.

<sup>47</sup> Section V.

<sup>48</sup> This did not take into account a longer sentence or term of a conditional pardon.

covenant, or indenture'. This arrangement would then determine both the status of the transported offender and the duration of the sentence.

The pressure upon an offender to sign was considerable, and varied according to the nature of the conviction—capital or non-capital. If the offender had been capitally convicted and refused to sign, he or she would be deprived of clergy and returned to the place of original conviction to be hanged at the next assize or quarter sessions. If the offender had not been capitally convicted, for example was a vagabond, he or she was to be 'thrice publickly whipt through such port-town, and afterwards remain close confined in goal (sic), til he or she be transported'.

Framing the scheme to induce offenders to sign indentures before leaving Ireland is not without problems. The scheme was stated conditionally. There was no obligation upon the chief magistrate to enter into an agreement with the shipping contractor. What if he did not? What would then be the position of an offender about to be transported? Was the ambiguity surrounding the arrangement intended to permit offenders to transport themselves in certain circumstances? Section V implied that the terms of the articles, covenant, or indenture would be agreed between the chief magistrate and the contractor in some form of prior negotiation, presumably associated with the negotiation of the shipping contract. The offender was to have no part in the process of negotiation, but was to adhere to it by signing and sealing. The binding effect of such a transaction upon the offender under English law was considered in Chapter 1.<sup>49</sup> In order to facilitate some form of trade in convicts to America, 12 Geo I c. 8 went on to require that lists of

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<sup>49</sup> Whether Irish law took a different view about the effect of duress requires further research. Despite its probable voidable status at law, the effect of an indenture might, nevertheless, have given the transported offender some small measure of protection once he or she reached America that would have been lacking otherwise.

offenders awaiting transportation were to be drawn up and circulated to the Lord Mayor of Dublin, the Mayors of other towns, and the exchanges. The amount of subsidy was also to be advertised. The Lord Mayoralty of Dublin was later to regard the profits that resulted from such arrangements as a perquisite of the office.<sup>50</sup> Ekirch provided a brief summary of the later trade in Irish convicts to America.<sup>51</sup>

Why the compulsory use of indentures appeared in 1725 is not clear. One possible explanation may rest on the absence of any provision, stemming from the 1719 legislation, for ‘property or interest in the service of the offender’. Whether the omission of such a provision by the Irish parliament had been accidental or intentional, the compulsory use of indentures would have given the process of forced labour following transportation some form of legal appearance. The shipping contractor, on arrival in America, would then have been able to sell the contract of indenture. In one sense then, the Irish approach, whether papering over an error or not, would have resulted in a somewhat more sophisticated outcome. Another possible justification for the compulsory use of indentures lay in the provision of Section V of the British statute 4 Geo I c. 11 covering the transportation of vagrant London youths to America. By 1725, the British scheme may have been showing evidence of success that could be applied in an Irish context that was otherwise free of the concept of property in the service of the offender.

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<sup>50</sup> Section VIII. And see Reece, *The Origins of Irish Convict Transportation to New South Wales*, pp. 12-13.

<sup>51</sup> Ekirch, *Bound for America*, pp. 83-5.



One question remains; was the use of compulsory indentures in the Irish 1725 legislation merely the logical implementation of a ‘property in the service of the offender’, or was it altogether different in intention and purpose? The fact that the British parliament continued to utilise the formula ‘property in the service of the offender’ would support the argument that ‘property in the service of the offender’ and indentures were not identical. Additionally, the enactment of further legislation in 1798 by way of a response to Governor Hunter’s problem in New South Wales in 1795, which is discussed below, would support this view.

From the above research it is possible to offer the following answers to the first two questions asked in this Chapter. During the eighteenth century, the kingdom of Ireland operated its own transportation regime, which both reflected Ireland’s particular requirements but which, on a few occasions, followed the terminology of Britain’s legislation. When the British legislation of 1717 was copied into Irish law in 1719, small but important differences occurred, but whether these differences occurred by design or inadvertence is not yet clear. Assuming the differences were deliberately drawn, it is reasonable to conclude that, on a proper interpretation of the 1717 British statute, a ‘property in the service of the offender’ related only to conditionally pardoned and transported offenders from England. The formula was not an essential element of the transportation of felons within clergy. For these lesser offences the concept of the convict being made available to the ‘use’ of the shipping contractor sufficed. Whether these distinctions in Ireland were significant was lost in the insistence upon convicts from Ireland being required to sign indentures by which mechanism their labour would be sold into the American labour market. But the circumstances, compared with convicts

transported from England, were vague as regards the duration of their terms and the legal effects of them serving out a sentence of transportation.

After 1725, the Irish parliament continued to modify its transportation laws. The contents of those laws extend beyond the scope of this thesis, although they are identified in Appendix 3. The refusal of the American colonies in 1775 to continue to receive offenders transported from Ireland had a similar impact in Ireland to the situation that developed in England. To put this in context it is useful, briefly, to consider developments in the Irish criminal justices system with respect to transportation. Between 1775 and the end of 1800, when the Irish parliament ceased to exist, nine further statutes addressed the issue of transportation. These statutes are summarised in Table 10.

**Table 10: Irish transportation statutes from 1775 to 1800**

	Year and Irish regnal year citation	Mischief or target
1.	1778: 17 & 18 Geo III c. 9	Inability to send offenders to America; permitted their deployment at hard labour
2.	1786: 26 Geo III c. 24	The Dublin Police Act, permitted transportation for squatting
3.	1790: 30 Geo III c. 32	Permitted the Lord Lieutenant to designate destinations for transportation (in lieu of America)
4.	1792: 32 Geo III c. 27	To permit offenders under order of transportation to be utilised in houses of correction and taught a trade
5.	1798: 38 Geo III c. 59	Doubts whether under existing laws whether property in the service of the offender was transferable – see below
6.	1798: 38 Geo III c. 78	Following the 1798 Rebellion, some offenders under transportation orders have not departed
7.	1799: 39 Geo III c. 36	An extension and elaboration upon 38 Geo III c. 78
8.	1800: 40 Geo III c. 44	Ditto

**Source:** *The statutes at large, passed in the Parliaments held in Ireland: from the third year of Edward the Second, ...* (20 Vols. Dublin 1783-1801) and Queen's University Belfast legislative database.

The Irish transportation regime after 1775 was concerned with three major issues. First, there was the need to provide substituted punishment in Ireland in the face of disruption of transportation to America. In Ireland, as in Britain, offenders were put to hard labour cleaning rivers and harbours. Measures were also put in place to enable remission of sentence by way of reward for diligent work.<sup>52</sup>

The second major issue to emerge during this period was a by-product of the improvements in Irish policing, particularly in Dublin which was subject to social unrest. In 1786 squatting and rioting were added to the list of offences liable to lead to transportation, provided transportation itself could be achieved.<sup>53</sup> The third major issue to emerge towards the end of this period was the punitive aftermath of the Irish Rebellion of 1798 against continuing British rule in Ireland. Following the defeat of the rebellion of the Society of Free Ulstermen, rebels in prominent positions were tried by courts martial and executed. Others were ordered to transportation by acts of attainder, thus obviating the necessity of conducting trials. The legislation of 1798 (38 Geo III c. 78) and the legislation of 1799 and 1800 addressed technical problems following from the efforts to transport these offenders which are beyond the scope of this thesis.

For the purposes of this thesis, however, the major development was the passage of the 1798 statute 38 Geo III c. 59: item 5 in Table 10. The origins and significance of this legislation are considered below. It is now appropriate to consider the final question to be considered in this Chapter: how did Irish law deal with the status of offenders transported to the Australian colonies?

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<sup>52</sup> This legislation copied, generally, the use of the hulks in England.

<sup>53</sup> A comprehensive analysis of the period in contemporary Ireland and civil unrest, particularly in Dublin, is contained in Stanley Palmer's *Police and Protest in England and Ireland, 1780-1850* (Cambridge, 1988). See pp. 92, 97-104.

In Ireland, as in England after 1784, the possibility of a revival of transportation remained in the minds of government. Attempts were made to transport Irish convicts to the West Indies and British Canada, including Quebec, Nova Scotia and Newfoundland and penal settlements flourished there for a short time, but all ended in failure. The intention behind these transportations remained the same; the shipping contractor would sell the convicts' labour at the port of destination. To this end convicts were required to sign indentures on at least two occasions prior to transportation; one in May 1788 and the other in June 1789.<sup>54</sup> These unsuccessful efforts are retold in Bob Reece's *The Origins of Irish Convict Transportation to New South Wales*, Chapters 6 though to 12.<sup>55</sup>

In January 1787 George III formally announced the British government's decision to transport convicts to Botany Bay.<sup>56</sup> Despite speculation in Dublin that Botany Bay would also be utilised by the Irish government as a destination for Irish convicts as well, efforts by the Irish government to have the British government acquiesce in such an endeavour failed on the matter of money and political inertia in Westminster. Westminster expected Dublin to pay the bill for the transportation of Irish convicts and Dublin found the anticipated costs to be too high. In debating the matter in 1790 the Irish House of Commons was told the costs per convict would amount to £70-80, an amount far in excess of the cost of maintaining the convicts in gaols in Ireland.<sup>57</sup>

The possibility of Ireland's criminals being transported to New South Wales was considered by the Irish Government in 1790 and enabling legislation was passed

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<sup>54</sup> Reece, *The Origins of Irish Convict Transportation to New South Wales*, pp. 150, 178

<sup>55</sup> Reece, *The Origins of Irish Convict Transportation to New South Wales*, pp. 98-230.

<sup>56</sup> Reece, *The Origins of Irish Convict Transportation to New South Wales*, p. 129

<sup>57</sup> Reece, *The Origins of Irish Convict Transportation to New South Wales*, p. 233

by the Irish parliament. This was the statute 30 Geo III c. 32, which, instead of identifying America as the sole destination for transportation, provided instead:

That it shall and may be lawful of the lord lieutenant ... to cause all felons and vagabonds who now are, or shall be under any sentence, rule, or order of transportation to be transported and conveyed to such part or parts beyond the seas, in such manner as the lord lieutenant ... shall think proper, any law or laws to the contrary thereof notwithstanding.

The costs of all such transportations were to be borne by ‘his Majesty’s treasury in this kingdom’, meaning Dublin Castle.

At the beginning of 1791, mounting political pressure in Dublin to alleviate overcrowding in the gaols, and a more conciliatory attitude in Westminster caused the Irish government to seek tenders for direct transportation of Irish convicts to New South Wales. At a cost of £34 per head, the transport ship *Queen* sailed from Cork on 16 April 1791.<sup>58</sup> Three shipments of convicts from Ireland followed, as summarised in Table 11.

**Table 11: Transport arrivals from Ireland, 1791 to 1796**

Transport	Sailed from Ireland	Arrived Sydney	Convict arrivals		
			Male	Female	Total
<i>Queen</i>	16 April 1791	26 September 1791	126	22	155
<i>Boddingtons</i>	15 February 1793	7 August 1793	124	20	145
<i>Sugar Cane</i>	12 April 1793	17 September 1793	109	50	160
<i>Marquis Cornwallis</i>	9 August 1795	11 February 1796	163	79	233
<b>Totals</b>			522	171	693

Source: (Bateson 1969), pp. 132, 135, 138, 145-7, and 147-51.

Whether any of the transported offenders were required to sign indentures in accordance with Section VIII of the 1725 statute 12 Geo I c. 8 is not clear. There are no indicators in the State Records of New South Wales of any documentation to this effect having been received. The only records authorising transportations

<sup>58</sup> Charles Bateson, *The Convict Ships 1789-1868* (Glasgow, 1969), p. 132.

from Ireland were warrants issued under the authority of the Lord Lieutenant and reciting convictions at assizes Copies of some of these warrants are held in the New South Wales State Records Office.<sup>59</sup>

The arrival of the *Queen* meant that, for the first time, convicts arrived in New South Wales under a legislative regime other than the English statute, 24 Geo III c. 56. The impact of this, despite the observations of Governor Hunter mentioned in the Introduction, has gone unremarked in the literature. Hunter's response to the arrival of the *Marquis Cornwallis* was also mentioned in the Introduction. The response to Hunter's letter in London can only be surmised from what followed. On 9 February 1797 a letter was sent from the Home Office to Dublin Castle.<sup>60</sup> On 2 March 1797 the Duke of Portland acknowledged Hunter's letter, pointing out that he had sent Hunter's letter to Dublin and had pointed to the 'careless manner in which lists of convicts have been sent from thence.' He added. 'I have given directions that an account of all the convicts who have been sent or shall be sent from that kingdom shall be regularly made out, together with the terms of their transportation and the assignment of their services.'<sup>61</sup>

Apart from Portland's last remarks about assignment, the correspondence to Dublin Castle thereafter appears to have been concerned with the accuracy of the sentencing information rather than the status of the arriving convicts. Dublin Castle did not respond to the letter of 9 February 1797. On 20 March 1798 a further letter to the same effect was sent from Under Secretary John King at the

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<sup>59</sup> See, for examples, warrants of 7 November 1789 at State Records of New South Wales Reel 2426 [2/8274] pp. 290-300; 11 February 1791 at Reel 2426 [2/8247] pp. 261-2; and 15 February 1791 at Reel 2426 [2/8274] pp. 265-6.

<sup>60</sup> No copy of this letter survives, but its content can be surmised from the follow-up correspondence. It can be inferred from the correspondence that Under Secretary King may have even suggested a solution, but whether this extended to drafting the legislation is uncertain.

<sup>61</sup> Portland to Hunter, 1 *HRA* 2, pp. 7-8.

Home Department in London to Edward Cooke, the Under-Secretary in Dublin.<sup>62</sup>

King's letter concentrated on the supply of duplicate records for the convicts already in New South Wales. Cooke in Dublin responded to King in London on 24 March 1798. Cooke promised to send records for convicts on the *Queen*, all of whose sentences would have now expired. He undertook to send the outstanding information as soon as possible and ended the letter with an observation on the matter of status:

The Attorney General has been desired to consider the Laws in force for transportation of Convicts and to prepare such Bill as he shall judge necessary for transferring the service of convicts as suggested in your letter.<sup>63</sup>

On 12 June 1798 Attorney-General Arthur Wolfe was directed by the Irish House of Commons to bring in a bill 'to remove Doubts respecting the Property in the service of Persons transported from this Kingdom'.<sup>64</sup> The bill passed through the Irish Parliament and was approved by the House of Lords on 23 July 1798.<sup>65</sup> This was at the height of the Irish Rebellion and the bill received no comment in contemporary Irish newspapers. The approved bill was sent to London for review by the British Law Officers and received their approval and that of the English Privy Council on 25 September 1798.<sup>66</sup> Marquis Cornwallis, the Lord Lieutenant, gave royal assent on 6 October 1798 to the Irish statute 38 Geo III c. 59.<sup>67</sup>

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<sup>62</sup> Home Office Letter Book HO 122/4, fol. 416, TNA.

<sup>63</sup> HO 100/80, p. 146. The Irish attorney general was Arthur Wolfe.

<sup>64</sup> *JHCKI*, Volume 10, (1798), Reel 10, p. 341.

<sup>65</sup> See *JHCKI*, Volume 10, (1798), Reel 10, 27 June, first reading in Commons, p. 536; 10 July, third reading, p. 349; *JHLKI*, Vol. 8 (1798), Reel 14, 10 July, first reading, p. 114; 19 July, second reading, p. 115; 21 July, third reading and agreed, pp. 119-20. Attorney General Wolfe was ennobled as Lord Kilwarden and appointed Chief Justice of King's Bench. In this capacity he presided over the Irish House of Lords during that house's consideration of the bill.

<sup>66</sup> PC 4/8, p. 65, TNA.

<sup>67</sup> Dates extracted from the QUB Data Base.

The new Irish statute was short and to the point. It first recited that, ‘whereas doubts have been entertained, whether by the laws now in force, the property in the service of offenders transported under rules of courts of justice, or conditional pardons, may be transferred’. Since the concept of property in the service of an offender had never been a feature of the Irish transportation legislation, the recital was gently understating the problem. The remedy, nevertheless, was straight forward—the Lord Lieutenant was empowered, ‘by instrument in writing’, to transfer offenders awaiting transportation:

to any person or persons and his and their assigns, as the lord lieutenant ... shall think fit, for the same term, for which such offender or offenders, shall respectively have been ordered to be transported, or as shall be specified in any such condition of pardon and the person or persons to whom such assignment shall be made, his, or their assigns, shall have a property in the service of such offender or offenders for such terms respectively.

The circumstance of a person undertaking self-transportation was exempted from the operation of the statute.

By the use of the formula ‘property in the service of the offender’ and the exemption of self-transportation, the draftsman, most likely, Attorney-General Wolfe, had copied the 1784 English statute 24 Geo III c. 56. Apart from the reference to ‘doubts have been entertained’, there was no reference to the problem mentioned by Governor Hunter two and a half years earlier. Nevertheless, the implication was clear. Irish law, prior to September 1798, had never considered the concept of the transportation contractor having any property in the service of offenders transported from Ireland. It would also follow then that, from the perspective of Irish law, convicts sent to New South Wales before the new legislation took effect, were never in servitude in New South Wales.



A further convict transport, the *Britannia*, sailed from Ireland on 10 December 1796 with 177 convicts (134 male and 43 female) and arrived in Sydney on 27 May 1797. The arriving convicts would not have been subject to the provisions of the 1798 Irish statute 38 Geo III c. 59. The first Irish convicts to be transported under this new legislation sailed from Ireland on the *Minerva* on 24 August 1799 and arrived in Sydney on 11 January 1800. The 188 convicts on board (162 male and 26 female) thus became the first arriving convicts technically capable, under Irish law, to be the objects of the transfer of property in their services to Governor Hunter. A copy of the first instrument of assignment, dated 16 May 1799, was issued by Viscount Castlereagh, on behalf of the Lord Lieutenant, Marquis Cornwallis.<sup>68</sup> This established the regular practice for the transportation of convicts transported from Ireland.

The passage in Ireland of the statute 38 Geo III c. 59 is not without difficulty. In the English legislation of 1717, the statute had first created the concept of a property and interest in the services of transported offenders, and had then vested that property in the transportation contractor. Assignability had been included by implication. In contrast, the Irish approach was simply to authorise the Lord Lieutenant to transfer offenders awaiting transportation, who thereupon acquired property in the service of that offender. It was never clear from the Irish approach when property in the service of convicts from Ireland was created. The ‘doubts’ mentioned in the recital was more a statement of conformity to English practice. This masked the earlier absence of any substantive element of Irish law

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<sup>68</sup> SRNSW: NRS 1150 [4/3999] and Fiche 625.01-02.

addressing the subsequent status of transported Irish offenders. Only the use of indentures between 1725 and 1775 addressed this matter.

Following the passage of the legislation in Dublin in 1798 and its implementation after 1800, the status of Irish convicts transported to the Australian colonies was determined by a procedural element and dependent upon the instruments signed by the Lords Lieutenant. It is not clear from this research how long this practice was maintained and whether every transport departing from Ireland carried the appropriate instrument or whether a later Lord Lieutenant issued a blanket instrument.

One surprising result from this research points to the scant attention that was paid in London to the processes of transportation from Ireland after the parliamentary union in 1801. Anticipating for the moment the narrative in Chapter 8, it is not inappropriate to point out here that out of the 109 acts of the first session of the parliament of the United Kingdom, some twenty-eight (25%) concerned affairs in that part of the United Kingdom called Ireland. But this apparent interest in the management of Irish affairs in London did not extend to the status of the transportation of offenders from Ireland. Between 1801 and 1853, other than legislation specifically applying to prisons in Ireland and their management, only eight acts applied to transportation from Ireland as such. Even the principal act covering transportation after 1801, the 1824 act 5 Geo IV c. 86 prepared under the auspices of Robert Peel, did not apply to Ireland and was limited to offenders transported from Great Britain. The shift from transportation beyond the seas to hard labour at home resulted in legislation specific to Ireland in 1826 (7 Geo IV c. 9), 1828 (three acts; 9 Geo IV c. 53, 54, and 55), 1842 (5 & 6 Vict c. 28, which

referred to the idea of 'assimilating Irish law into the law of England), and 1848 (12 & 13 Vict c. 27). Ireland was also mentioned specifically in 1834 (4 & 5 Wm IV c. 26), which authorised executed criminals being buried in the grounds of Irish gaols.

One of the acts of 1828 (9 Geo IV c. 53) repealed some of the provisions of the 1719 Irish statute 6 Geo I c. 12 (Tisdall's statute). However, the intent was not to alter the law with respect to transportation from Ireland, but to expand the list of crimes for which transportation was available. These offences were included in the enactment of the same session; 9 Geo IV c. 55.

It is now possible to address the third question addressed in this Chapter: how did Irish law deal with the status of offenders transported to the Australian colonies?

The evidence considered above makes it clear that, prior to 1798, Irish law had never utilised the concept of 'property in the service of the offender', even after convict transportation to New South Wales started in 1791. Therefore it is reasonable to conclude that Irish convicts transported to New South Wales were never in servitude according to Irish law. After 1798 (1800 in practice) assignment of the Irish convicts was possible, provided proper documentation was completed.

The overall conclusion about transportation from Ireland then is that Ireland after 1800 was left with much of the pre-1801 mechanisms for transportation, including the requirement of the 1798 statute that the Lord Lieutenant would, by instrument, pass property in the service of the offender in transported Irish convicts to his nominee. This remained the case after 1824 when statutory assignment with

respect to convicts transported from Great Britain was introduced. Irish transportation therefore remained vulnerable to process failure under Irish law.

## Chapter 6: Transportation from Scotland

If the arrival in New South Wales of convicts from Ireland before 1800 lacked any means of assigning property in their services, then the circumstances and status of convicts transported from Scotland proved to be even more problematic.

Transportation as a statutory punishment was not extended to Scotland until 1766.<sup>1</sup> But it was not entirely unknown either. In this Chapter, the circumstances of transportation from Scotland and the status offenders arriving in New South Wales are considered through three questions: first, how did the transportation regime operate from Scotland before 1784? Second, how was transportation from Scotland different to transportation from England after 1784? And third, how were differences between the two parallel systems resolved? The material considered in this chapter has not been considered previously in the literature.

Transportation from Scotland has received two different sorts of attention. One of these examines transportation as an extension of transportation from England.

Writing in 1984, the Scots historian Ian Donnachie was not attempting to develop a general history of Scottish transportation, but was building on the earlier work of the Australian historians Lloyd Robson and AGL Shaw in outlining the characteristics of the Scottish convict population of New South Wales and Van Diemen's Land.<sup>2</sup> Donnachie, utilising figures from both Robson and Shaw, pointed out that, of the nearly 150,000 convicts transported from Great Britain and Ireland between 1787 and 1868, only about 7,660 or 5.1% were tried and

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<sup>1</sup> 8 Geo III c. 15.

<sup>2</sup> L.L. Robson, *The Convict Settlers of Australia* (Melbourne, 1965) and AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London, 1966). Ian Donnachie, "Scottish Criminals and Transportation to Australia, 1786-1852," *Scottish Economic and Social History*, 4 (1984), pp. 21-38.

sentenced by Scottish courts.<sup>3</sup> A subsequent work by Malcolm Prentis observed the demographic nature of Scottish migration to Australia and, beyond noting the numbers of convicts with Scottish origins, adds nothing to the arguments in this thesis with respect to transportation from Scotland.<sup>4</sup> Morgan and Rushton, in the most recent analysis of banishment practices from Great Britain and the American colonies, point to the longstanding practice of Scottish banishments and its subsequent operation in parallel with transportation.<sup>5</sup>

The other category of literature on transportation from Scotland is legal in nature. In 1797 David Hume, then a lecturer in law at the University of Edinburgh, published a short treatise on crime and punishment in Scots law.<sup>6</sup> Hume covered the history and nature of Scottish transportation in only nine pages, most of it concerned with processes put in place prior to 1785.<sup>7</sup> In the mid-1790s there was a short period when the issue of transportation from Scotland received considerable legal attention. This centred on the prosecution and conviction of five men before the Court of Justiciary on charges of sedition and their subsequent transportation to New South Wales—the ‘Scottish Martyrs’. The circumstances of the Scottish Martyrs are considered below in some detail, but the debates in the House of Commons and the House of Lords early in 1794 and the contemporaneous views of John MacLaurin, one of the civil judges of the Court of Session, considerably

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<sup>3</sup> Donnachie, "Scottish Criminals and Transportation to Australia, 1786-1852", p. 22.

<sup>4</sup> Malcolm D Prentis, "What Do We Know About the Scottish Convicts?," *Journal of the Royal Australasian Historical Society*, 90 (2004), pp. 36-52.

<sup>5</sup> G Morgan and P Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London, 2013), p. 40. Morgan and Rushton assumed, at p. 40, that adjudgement of service in New South Wales meant that an offender was to be transported to the colonies for indentured servitude.

<sup>6</sup> David Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes* (Edinburgh, 1800).

<sup>7</sup> In effect Hume picked up where Ekirch finished. See A. Roger Ekirch, "The Transportation of Scottish Criminals to America During the Eighteenth Century," *Journal of British Studies* 24, (1985), pp. 366-74.

expand our understanding of transportation from Scotland in the 1790s.<sup>8</sup> Even after the event, the trials of the Scottish Martyrs within the context of Scots law were extensively examined, first by John Burnett in 1811, than by Archibald Alison in 1832 and, finally, by Henry Thomas (Lord) Cockburn in the 1850s. Burnett presented the arguments put before the courts in each of the trials.<sup>9</sup> In doing so, he presented a balanced view of the positions adopted by both the prosecutions and the defence, but leaned towards favouring the prosecution arguments. Alison was more supportive of the prosecution position.<sup>10</sup> Neither Burnett nor Alison gave attention to the subsequent transportation of the defendants. Cockburn's analysis was intended to highlight the many miscarriages of justice surrounding the trials and the poor behaviour of the senior trial judge Robert McQueen, Lord Braxfield, the Lord Justice Clerk. Cockburn's intention was to ensure that the injustices associated with the trials of the martyrs would never be repeated in Scotland. Given his polemical intent, Cockburn gave little time to the issue of the resulting transportations other than to relate it closely to slavery.<sup>11</sup> Another recent publication which addresses some aspects of sentencing practice in Edinburgh between 1800 and 1812 and helps to rationalise the varying uses of banishment and transportation is John McGowan's *A New Civic Order*:

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<sup>8</sup> The Court of Session was Scotland's superior court. It operated in two divisions; a civil division which was called the Court of Session, and a criminal division, usually referred to as the Court (sometimes the High Court) of Justiciary. As mentioned earlier, John MacLaurin adopted the courtesy title of Lord Dreghorn on his appointment but published under his own name. Lionel Alexander Ritchie, 'MacLaurin, John, Lord Dreghorn (1734-1796)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/17645>, accessed 17 Feb 2014]

<sup>9</sup> John Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (Edinburgh, 1811). See Chapter XIII 'On Sedition', pp. 240-261, especially pp. 244-256.

<sup>10</sup> A Alison, *Principles of the Criminal Law of Scotland* (Edinburgh, 1832), pp. 580-95.

<sup>11</sup> Henry Thomas Cockburn, *An Examination of the Trials for Sedition Which Have Hitherto Occurred in Scotland*, (Edinburgh, 1888). The two volume analysis was completed in 1853 but was not published until 1888, some thirty-four years after Cockburn's death.

*The Contribution of the City of Edinburgh Police, 1805-1812*.<sup>12</sup> McGowan's work is considered later in this Chapter.

The extension of the transportation legislation to Scotland after 1784 has received only a passing reference in the literature and lacks any discussion about the resulting status of a convict ordered to transportation by a Scottish court.<sup>13</sup> In one sense, the sparse literature is understandable. When compared to England, capital punishment was not as widely used in Scotland in the final years of the eighteenth century.<sup>14</sup> It followed that when transportation became available to Scottish judges after 1 July 1785 as a measure to ameliorate the use of capital punishment, the numbers of men and women sent to New South Wales were always fewer than convicts transported from England.

Turning now to the first question to be considered: how did the transportation regime operate from Scotland before 1784?

Banishment in non-capital cases had been used in Scotland from the time of James I in the 1400s.<sup>15</sup> From the 1660s Scottish judges had been using the punishment of banishment in non-capital felony cases.<sup>16</sup> This use of banishment lacked any statutory authority, but was tolerated both by the executive and by the parliament of the kingdom of Scotland. In 1700 the Scottish parliament had

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<sup>12</sup> John B McGowan, *A New Civic Order: The Contribution of the City of Edinburgh Police, 1805-1812*. (Musselburgh, Scotland, 2013).

<sup>13</sup> See for example, Shaw, *Convicts and the Colonies*, p. 56, and C.M.H. Clark, *A History of Australia I; from the Earliest Times to the Age of Macquarie*, volume 1 (Melbourne, 1962), pp. 92-3. Ekirch's work on transportation from Scotland ended with the cessation of transportation in 1775. See Ekirch, "The Transportation of Scottish Criminals to America During the Eighteenth Century", pp. 366-74.

<sup>14</sup> Clark, *A History of Australia I*, pp. 92-3.

<sup>15</sup> Wilfred Oldham, *Britain's Convicts to the Colonies* (North Sydney, 1990), p. 204.

<sup>16</sup> Ekirch, "The Transportation of Scottish Criminals to America During the Eighteenth Century", p. 367. See also Morgan and Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves*, Chapter 2, pp. 24-42.



contemplated enacting legislation outlawing the use of banishment. The matter did not proceed, but it underscored apprehension in Scotland about the use of arbitrary punishment and the inability of the Scottish courts to intercede in transportation cases because of lack of jurisdiction, both issues which had driven the enactment of the Habeas Corpus Act in England in 1679.<sup>17</sup> This explains the intervention of the House of Lords in 1717 in deciding to exempt Scotland from the operation of 4 Geo I c. 11.

In effect then, between the 1660s and 1766, Scotland applied a form of banishment reminiscent of that devised from the English legislation; 39 Eliz I c. 4 of 1597 and I Jac I c. 7 of 1603, which had contemplated the banishment of vagabonds but which remained silent upon its consequences. This was brought into stark relief in the arguments voiced by the Jacobite rebels in 1716 in the face of their transportation to America. The rebels argued that they were consenting to banishment at the hands of Sir Thomas Johnson and not to transportation as his servants. The point of difference was that banishment with consent was consistent with the Habeas Corpus Act of 1679, whereas transportation without consent was not. Furthermore, the latter placed the transported offenders into servitude.<sup>18</sup> This distinction between Scottish banishment and the 'English' form of transportation invoked by 4 Geo I c. 11 masked a wider issue: how did transportation differ from banishment? This question was examined in some detail in debates on the fate of the Scottish martyrs. Speaking at length to the House of Commons in March 1794, William Adam, the member for Ross and sometime Scots and English trained lawyer, summarised the difference in the following terms:

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<sup>17</sup> Oldham, *Britain's Convicts to the Colonies*, p. 204.

<sup>18</sup> Arthur C Wardle, "Sir Thomas Johnson and the Jacobite Rebels," *Transactions of the Historical Society of Lancashire and Cheshire*, 91 (1939), pp. 131-3.

The punishment inflicted by the Court of Justiciary upon a person convicted of that crime (subordination of perjury), as late as 1738, was *banishment*, with certification that if the party returned he should be *transported*. Here then is a case less than capital, where the punishment is arbitrary, that is discretionary, where the discretion dictated the punishment of *banishment*, and where the greater punishment of *transportation* is inflicted in case of return; establishing at a very recent period, not only the gradation of those punishments, but the distinction between them.<sup>19</sup>

Adam traced the ancient origins of banishment from Scotland and pointed out the administrative and jurisdictional limitations of the punishment. Scotland had neither empire nor colonies: the jurisdiction of the Court of Justiciary extended only to the English borders. The enforcement of transportation was, therefore, strictly beyond Scottish law.<sup>20</sup> Writing in 1800, the Scottish jurist David Hume extended the argument expressed by Adam by pointing out:

It has been the ordinary course for the execution of this sentence [banishment], that the convict is charged with the care of himself; being released from prison, and allowed a reasonable space of time to settle his affairs and depart;<sup>21</sup>

The remarks of William Adam in 1794 highlight the obvious fact that until 1766 Scottish law had evolved its own form of banishment, which merely had the effect of the offender voluntarily removing himself from Scotland. Scottish law did nothing to address or even alter the status of a banished offender once they had departed from Scotland. After 1766 this position altered and Scottish offenders, like those in England, were subject to the provisions of the regime constituted by 4 Geo I c. 11. As will be considered later, Adam's comparison between

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<sup>19</sup> Speech by William Adam to the House of Commons on 10 March 1794. *The Parliamentary Register; of History of the Proceedings and Debates of the House of Commons; containing an Account of the most interesting Speeches and Motions; accurate Copies of the most remarkable Letters and Papers; of the most material Evidence, Petitions, &c laid before and offered to the House, during the Fourth Session of the Seventeenth Parliament of Great Britain.*, Volume 38 (31 March 1794 to 11 July 1794), pp. 489-529, at p. 504. Adam's efforts on behalf of the Scottish martyrs, a group of dissidents transported to New South Wales for, in effect, criminal libel failed.

<sup>20</sup> *Ibid.* p. 498.

<sup>21</sup> Hume, *Commentaries on the Law of Scotland, Respecting Trials for Crimes*, p. 369.

banishment and transportation from Scotland was to have some useful applications when examining the status of offenders transported to New South Wales. During the House of Lords debates in 1794, the Earl of Mansfield, opposing the supporters of the Scottish martyrs, posited that ‘transportation was comprehended in the punishment of banishment’<sup>22</sup> David Hume made no mention of Mansfield’s views, not did later Scottish commentators.

Turning now to the second question to be considered in this chapter: how was transportation from Scotland different to transportation from England after 1784?

In 1784, parliament had restated the laws with respect to transportation. But that legislation was limited to transportation from ‘that part of Great Britain called *England*’. On 30 May 1785 Ilay Campbell, the Lord Advocate for Scotland, introduced legislation into the House of Commons enabling revived transportation from Scotland. Campbell was assisted by Henry Dundas.<sup>23</sup> The legislation that emerged: *An act for the more effectual transportation of felons, and other offenders, in that part of Great Britain called Scotland, and to authorize the removal of prisoners in certain cases*. The bill received royal assent on 4 July 1785, as the statute 25 Geo III c. 46, which took effect from 1 July in that year.<sup>24</sup>

There was no obvious trigger for the legislation being brought forward in May 1785 and not earlier. It is clear, however, from the *House of Commons Journals*

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<sup>22</sup> *The Parliamentary Register; of history of the proceedings and debates of the House of Lords: Volume XXXIX*, (London, 1794), p. 242. David Murray, 2<sup>nd</sup> Earl of Mansfield held the sinecure post of Lord Justice General of the Court of Session. H. M. Scott, ‘Murray, David, seventh Viscount Stormont and second Earl of Mansfield (1727–1796)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 [http://www.oxforddnb.com/view/article/19600, accessed 1 Sept 2015].

<sup>23</sup> Henry Dundas was Lord Advocate for Scotland between 1775 and 1783 and Home Secretary from 1791 to 1794. He was appointed Viscount Melville in 1802. Ilay Campbell was Lord Advocate from 1784 to 1789. <http://www.historyofparliamentonline.org/volume/1754-1790/member/dundas-henry-1742-1811>. Accessed 3 February 2105.

<sup>24</sup> *Journals of the House of Commons* (hereinafter *JHC*), volume 40, (1784–1785), p. 1032.

for the first half of 1785 that a number of specifically Scottish acts were considered in Westminster.<sup>25</sup> At the time the legislation was passed in 1785 transportation from Great Britain remained dormant, only to be revived in August the following year.

The new legislation, 25 Geo III c. 46, while similar in construction and process to that applicable in England, was not identical. The differences were not just limited to the language of the legislation, but extended to the modes of sentencing handed down by the judges of Scotland's senior criminal court, the Court of Justiciary.

Three major points of difference in application and understanding were to emerge during the forty years of the operation of the Scottish legislation. One was peripheral; how and when was the punishment of transportation discharged? A second arose from the first and concerned the differences between statutory transportation from Scotland and the use of judicial banishment, but without any consideration being given to the utilisation of the banished offender's labour.<sup>26</sup>

Were these aspects of the same process or were they fundamentally different? The third point of difference related to the application of property in the service of an offender transported from Scotland as a result of the peculiarly Scottish judicial use of the concept of 'adjudgement'. This flowed directly from the language of 25 Geo III c. 46.<sup>27</sup> These legislative differences raised a derivative issue: how did Scottish law impact upon the status of a convict in New South Wales who had been sentenced to transportation by a court in Scotland?

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<sup>25</sup> See *JHC*, volume 40 (1784-1785). This legislation canvassed the jurisdiction of the Court of Session, the number of judges and their salaries, Scottish based elections, and Scottish criminal law.

<sup>26</sup> The parallel usage of 'transportation' and 'banishment' was to emerge in Scotland in the interesting circumstances of the 'Scottish Martyrs' in 1793.

<sup>27</sup> 'Adjudge' was derived directly from the language of 25 Geo III c. 48 considered below. Two variants were used later; 'adjudication' and 'enact' or 'enactment'.

Almost from the outset the provisions of 25 Geo III c. 46 showed signs of taking a slightly different course from the English legislation. The operative part of the statute stated that (emphasis added):

when any Person or Persons shall be lawfully convicted, before any Court competent for the Trial of Crimes in Scotland, of any Offence for which the Punishment of Transportation or Banishment beyond the Seas may be inflicted, it shall and may be lawful for the said Court to order and adjudge, that such Person or Persons so convicted as aforesaid, shall be transported beyond the Seas, *in like Manner as is now in Use*; and in every such Case, it shall and may be lawful for his Majesty, by and with the Advice of his Privy Council, to declare and appoint to what Place or Places, Part or Parts beyond the Seas, either within his Majesty's Dominions, or elsewhere out of his Majesty's Dominions, such Offenders shall be conveyed or transported:

The words 'in like Manner as is now in Use' were not in the English legislation. MacLaurin later argued that the effect of this wording was merely to introduce the only new part of the legislation which was to 'give certain powers to the King, with regard to persons convicted of crimes, for which transportation, with the adjudication of service, was deemed a proper punishment.'<sup>28</sup> The overall effect then, according to MacLaurin, was to carry all the provisions of the earlier practices of transportation from Scotland into the 1785 legislation. One of these practices, which had never been a part of English transportation, was the concept of 'adjudging' or 'adjudicating' the service of a transported offender.<sup>29</sup> The wording of the operative part of the statute quoted above continued by addressing the issue of adjudgement directly. This is illustrated in Table 12, which compares the English and Scottish legislation (again, emphasis added):

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<sup>28</sup> John MacLaurin, "Of the Punishment of Transportation", in Volume 2 of *The works of the Late John MacLaurin* (Edinburgh, 1798), p. 65.

<sup>29</sup> Hume referred to the earlier Scottish use of adjudgement of a convicts service as far back as 1726. See Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes*, pp. 366-7.

**Table 12: Comparison of English and Scottish sentencing terminology**

<b>24 Geo III c. 56 – England</b>	<b>25 Geo III c. 46 - Scotland</b>
and such Court as aforesaid is hereby authorised and empowered to order such Offenders to be transferred to the Use of any Person or Persons, and his or their Assigns , who shall contract for the due Performance of such Transportation:	and such Court is hereby authorised and empowered to <i>adjudge the Services</i> of such Offenders, and to order them to be transferred to the Use of any Person or Persons, and his or their Assigns, who shall contract for the due Performance of such Transportation:

The difference between the laws is significant. Scottish law, unlike that of England, gave to the judges of the Court of Justiciary a discretionary power to adjudge the services of a transported offender to the transportation contractor. By implication, they also had the power not to adjudge services. Using this approach, the Court of Session appeared to downplay the later provision of the statute which, in identical terms to the English statute (24 Geo III c. 56), provided that ‘and such Person or Persons so contracting as aforesaid, his or their Assigns, by virtue of such Order of Transfer as aforesaid, shall have a Property in the Services of such Offender or Offenders for such Terms respectively.’

The evidence considered below suggests that, from the very first use of the punishment of statutory transportation after 1 July 1785, Scottish judges rarely adjudged an offender’s services.<sup>30</sup> The consequence therefore was that, in the view of the sentencing justices, an offender transported from Scotland without an adjudgement of service was never in servitude as the result of the conflation of two processes. First, the judge could have adjudged service, but chose not to. Second, where the judge did not adjudge service, the transportation contractor acquired no property in the service of the offender and, therefore, had nothing to assign at the point of disembarkation. The idea of a term of transportation with an

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<sup>30</sup> See Table 13 below.

adjudgement of service meant, in effect, that two overlapping forms of punishment had been applied. Governor Macquarie was later to refer to this overlap as a 'double sentence'. But it was to take until 1817 until the form of sentencing was explained.<sup>31</sup>

Even before the decision had been made in London to settle New South Wales in August 1786, the Court of Justiciary, on circuit in Aberdeen in April 1786, sentenced Alexander Moir to seven years transportation to a place to be designated by the King in council but, according to the Privy Council record, there was no adjudgement of his services.<sup>32</sup> After Moir's sentence in 1786, a small number of sentences of transportation followed in 1786 and 1787. The first convicts from Scotland did not actually leave England for New South Wales until the departure of the *Pitt* transport on 17 July 1791.<sup>33</sup> On 3 and 8 June 1791 meetings of the Privy Council were convened at St. James's Palace. At the meeting held on 3 June an order in council was approved naming 277 male and female convicts to be sent to New South Wales from England.<sup>34</sup> On 8 June, after the swearing of Henry Dundas as a privy councillor and Secretary of State for the Home Department, the Council approved the transportation of thirty convicts from England and forty-six from Scotland. According to the Privy Council minute, the services of only two of the convicts had been adjudged: George Molison had been sentenced at Edinburgh on 31 December 1789 to transportation

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<sup>31</sup> See Macquarie to Bathurst, 13 March 1816. 1 *Historical Records of Australia* (hereinafter *HRA*) Volume 9, pp. 49-52. The explanation was set out in an enclosure contained with Bathurst's response dated 21 April 1817, 1 *HRA* 9, pp. 382-5, at 383.

<sup>32</sup> Order in council of 8 June 1791; Privy Council Register PC 2/136 p. 158, The National Archives (hereinafter TNA). See also the Indent for the convict transport *Pitt*, 1791. State Records of New South Wales (hereinafter SRNSW) Fiche 623.

<sup>33</sup> The *Pitt* arrived at Sydney on 14 February 1792. Following Bateson, the *Pitt* is usually regarded as the first convict transport to arrive at Sydney after the voyages of the First, Second, and Third Fleets. Charles Bateson, *The Convict Ships 1789-1868* (Glasgow, 1969), p. 139.

<sup>34</sup> PC 2/136 pp. 138-50, TNA

for life with ‘service for 7 years’, while James Muldroch had been sentenced at Dumfries to transportation for fourteen years but ‘service for 7 years’.<sup>35</sup> The lists of the convicts transported do not appear to be those attached to the original orders in council, nor do they identify all of the convicts who travelled on the *Pitt*, although they do itemise separately thirty-nine (or 9.6%) convicts who had been sentenced by the Court of Justiciary. Of these thirty-nine, only three (or 0.74% of the overall total) recorded an adjudgement of the convicts’ services.

In London, on 15 June 1791, Thomas Shelton, using the authority vested in him by the king pursuant to 28 Geo III c. 24, contracted with shipowner George Mackenzie Macaulay for the charter of the *Pitt*.<sup>36</sup> The measures to load the ship seem to have been rushed. The vessel eventually sailed for Sydney on 17 July 1791 after a suspected outbreak of smallpox.<sup>37</sup> Such was the rush that, in a letter dated 5 July 1791, Secretary of State Dundas had to advise Governor Phillip that it had not been possible to prepare copies of the orders in council for use in New South Wales and they would be sent later.<sup>38</sup> The convicts ordered to transportation by the courts of Scotland were included in the processes administered in London by the Home Department. Shelton’s Account No. 5, dated 15 June 1791, covered the transportation of 419 convicts on the *Pitt*, fifty-three of whom came from eleven different court sessions in Scotland. In all, some eighty-nine different jurisdictions were identified in the account, which totalled £377 8s 2d.<sup>39</sup> While the

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<sup>35</sup> PC 2/136 pp. 154-8, TNA. According to the records in the State Records of New South Wales, a third convict, Thomas White had been sentenced at Glasgow on 21 April 1789 to transportation for life, ‘Service to be adjudged for 14 years.’ SRNSW Fiche 632, fol. 218.

<sup>36</sup> Dan Byrnes: <http://www.merchantnetworks.com.au/timelines/pathways1.htm>.

<sup>37</sup> Bateson, *The Convict Ships 1789-1868*, pp. 140-1. Byrnes thought it possible that it was intended that two companies of the New South Wales Corps also travelled on the *Pitt*. See <http://www.merchantnetworks.com.au/timelines/pathways1.htm>.

<sup>38</sup> 1 HRA 1, pp. 265-6.

<sup>39</sup> Audit Office file AO 3/291, ff. 69-88, TNA.



account covering, for example, the ‘City of York’ included the costs of ‘Drawing contract to transport him (a single convict)’ and the preparation of the appropriate bond, the equivalent entry for Glasgow merely referred to the drawing of the bond; no reference was made to any contract.<sup>40</sup> Shelton’s account then went on to make separate references to ‘preparing Assignment and transfer to the Contractor of the Convicts embarked on board the *Pitt*’ and to ‘Drawing and engrossing assignment of such convicts from the Contractor to the Governor of New South Wales’.<sup>41</sup> This was, essentially, the same drafting formula utilised for the vessels of the Third Fleet. A similar process was used for the convicts transported on the *Royal Admiral*, also in 1791. By way of amplification, a contract, dated 8 May 1791 with Thomas Larkins, Commander, covered the transportation of 352 convicts from seventy-six different English jurisdictions and one jurisdiction, namely ‘Scotland’. The cost of the documentation was £306 2s 4d.<sup>42</sup> No contract or assignment was mentioned with respect to the Scottish convicts.

If confusion had surrounded the departure of the *Pitt*, then some apprehension must have settled in the mind of the new Secretary of State Henry Dundas. The text of the order in council of 8 June 1791 had followed that of orders in council used up until that date. These had all been made pursuant to the provisions of the English legislation, 24 Geo III c. 56, which was recited in the opening words of the order. Given that the majority of the convicts mentioned were being ordered to transportation pursuant to the Scottish legislation, it may have been apparent to the Dundas (or his staff) at the time, that some revision to the wording of the orders in council was necessary. This became apparent at the beginning of 1792.

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<sup>40</sup> AO 3/291, ff. 85, 86, TNA.

<sup>41</sup> AO 3/291, f. 87 (verso), TNA.

<sup>42</sup> Account No. 7 AO 3/291, ff. 93-109, at 108, TNA.

On 25 January 1792, eighteen female and eleven male convicts from England were ordered to be transported to New South Wales.<sup>43</sup> The order in council recited its authority as being pursuant to the English statute 24 Geo III c. 56. However, on 31 January a committee of the Lords of the Privy Council noted that ‘Mr Secretary Dundas’ had sent two lists to the Lord President of the Council for the transportation of convicts: one list was evidently of convicts from England and the other of convicts from Scotland.<sup>44</sup> William Fawkener, the Secretary of the Privy Council, wrote to the Attorney-General, Archibald Macdonald, requesting the preparation of ‘Draughts of two Orders in Council appointing the Eastern Coast of New South Wales or some one or other of the Islands adjacent to be the place to which the said convicts shall be conveyed’.<sup>45</sup> Secretary Fawkener attached his own draught of the order with respect to the English convicts but drew the attention of Attorney-General Macdonald to the existence of the legislation with respect to Scotland, 25 Geo III c. 46, requesting, in effect, the preparation of a compliant order for the use by the Privy Council. Secretary Fawkener did not attempt to prepare such a draught himself.<sup>46</sup>

Three months later, on 30 April 1792 it was evident that Attorney-General Macdonald had not responded to Secretary Fawkener’s request. A further letter was sent to the Attorney-General in much the same terms. Now, sensitive to Macdonald’s tardiness, Fawkener attached his own version of a draught order while reminding the Attorney-General that no prior order had been issued

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<sup>43</sup> Privy Council Register PC 2/136, pp. 406-9, TNA.

<sup>44</sup> PC 2/136, pp. 433-4, at 434, TNA.

<sup>45</sup> PC 2/136, p. 434, TNA.

<sup>46</sup> On 31 March 1792 the convict transport *Kitty* sailed from England carrying the twenty nine convicts mentioned in the order of 25 January.

pursuant to 25 Geo III c. 46.<sup>47</sup> Two days later, on 2 May 1792 two orders in council were approved by the Privy Council. The first identified 288 English convicts who were to be sent to New South Wales.<sup>48</sup> The second order in council listed nine Scottish convicts, who had been sentenced in Scotland between September 1785 and February 1790. In no case had the service of any of these convicts been adjudged to the contractor. The second order in council of 2 May 1792 recited the provisions of the Scottish statute 25 Geo III c. 46; this was the first specifically Scottish order in council.<sup>49</sup> On 30 May 1792 the *Royal Admiral* transport departed Torbay with seven Scottish convicts on board.<sup>50</sup> The material for the *Royal Admiral* in the New South Wales State Archive consists of only two separate lists of convicts transported and fails to mention any offenders sentenced in Scotland.<sup>51</sup> By 19 May 1792 Secretary Fawkener wrote to Under-Secretary Scrope Barnard at the Home Department referring to the Attorney-General's tardiness. Fawkener's comments are not available, but the form utilised by the Privy Council at its meeting on 2 May remained in use with respect to Scottish convicts as considered below.<sup>52</sup>

The next Scottish convicts to be sent to New South Wales were the subjects of three separate orders in council; two of 8 January and one of 24 January 1794.<sup>53</sup>

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<sup>47</sup> PC 2/136, pp. 603-4, at 604, TNA.

<sup>48</sup> PC 2/137, pp. 1-11, TNA.

<sup>49</sup> PC 2/137, pp. 11-13, TNA.

<sup>50</sup> Bateson, *The Convict Ships 1789-1868*, p. 143. The fact that there are variances in numbers of convicts embarked in England and then disembarked in New South Wales is not uncommon and is usually accounted for by deaths in the home port or at sea.

<sup>51</sup> SRNSW Fiche 625, folios 386-96.

<sup>52</sup> Was the text Fawkener's or Macdonald's? The Scottish form of the order in council does not include some relevant provisions (for example, no mention was made of the king's authorisation of Thomas Shelton to enter into the contract for transportation in accordance with 28 Geo III c. 24) nor of an expiring statute with respect to the housing of convicts in transport in the English hulks. This poor legal input suggests that it was prepared by Fawkener against an impending deadline of the forthcoming Privy Council meeting without adequate input from the attorney general.

<sup>53</sup> PC 2/139, pp. 221-32 and PC 2/139, pp. 272-4, TNA.

These three orders resulted in the despatch of convicts from England and Scotland to New South Wales on the *Surprise* transport including the Scottish Martyrs.

Before considering their fate it is useful to compare their circumstances with some of the other thirty-nine convicts sent from Scotland to New South Wales in the *Surprise*. From the orders in council and the attested extract of the Indenture in the State Records of New South Wales it is recorded that John McLean was sentenced to banishment for life at Inverary in May 1786 and the (transportation) ‘Contractor was to have property in his Service for 14 years’. Thomas Morrison was sentenced at Glasgow in September 1791 to transportation beyond the seas for life, ‘his Service for 7 years to the Contractor’. Neal MacInnish and Malcolm MacLellan were both sentenced on 6 April 1793 at Inverary to transportation for life and ‘the Contractor to have property in his (their) Service for 7 years’. Lastly, John Campbell was sentenced at Glasgow in September 1793 to transportation beyond the seas for life ‘his Service for 7 years to the Contractor’.<sup>54</sup> There was no adjudgement of service for the remaining thirty-four convicts sentenced to transportation from Scotland.

Shelton’s Account No. 7, dated February 1794, covered a contract signed with Anthony Calvert for the transport *Surprise* (2).<sup>55</sup> This account covered ninety-eight convicts drawn from four English jurisdictions and ‘Scotland’. The costs from England covered ‘Drawing Contract from Anthony Calvert Esq.’ to transport the convicts, together with a performance bond, and the assignment of the convicts to the governor of New South Wales. The Scottish convicts merely

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<sup>54</sup> SRNSW Fiche 622, pp. 266-9.

<sup>55</sup> AO 3/291, ff. 117-118, TNA.

attracted a bond and a warrant for their delivery to the contractor from the Scottish courts. Two additional convicts were added later.

At this point an explanation of the background of the Scottish Martyrs is probably overdue. At the height of the French Revolution five men in Scotland were advocating liberal reforms in England, particularly that of the franchise of the House of Commons. The five men were Thomas Muir, a Scots advocate; the Reverend Thomas Fyshe Palmer, an English Unitarian minister; William Skirving, a Scots farmer, who had trained for the Presbyterian ministry; Maurice Margarot, an English wine merchant, and Joseph Gerrald, a West Indies born, English trained, sometime advocate in Pennsylvania.<sup>56</sup> Some belonged to or had spoken on behalf of the London Corresponding Society and had distributed pamphlets published by (the exiled) Thomas Paine. Opposed to any incursion of revolutionary sympathies into Britain, the British Tory government of William Pitt, assisted by the Secretary of State Henry Dundas, apprehended each man who was then prosecuted before the Court of Justiciary. The prosecutor was the Lord

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<sup>56</sup> Emma Vincent Macleod correctly points out that there were in fact seven ‘martyrs’. The two additional men were Robert Watt, was convicted and executed for treason in October 1794, and George Mealmaker was convicted of sedition in January 1798 and transported to New South Wales. Mealmaker has a small role later in this present discussion See Emma Vincent Macleod, ‘Scottish martyrs (act, 1792-1798)’, *Oxford Dictionary of National Biography*, Oxford University Press, May 2013 [<http://www.oxforddnb.com/view/theme/96891>, accessed 16 Dec 2013]. A general overall history of the five defendants and their associations with contemporary liberals in England, France, and Ireland is Frank Clune, *The Scottish Martyrs: Their Trials and Transportation to Botany Bay* (Sydney, 1969). Details of each of the trials are set out in T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, volume XXIII (London, 1817).

Advocate for Scotland, Robert Dundas.<sup>57</sup> The presiding officer in the Court of Justiciary was Lord Braxfield, the Lord Justice Clerk.<sup>58</sup>

The trials were held in August (Muir) and September (Palmer) 1793 and January (Margarot and Skirving) and March (Gerrald) 1794. All five were convicted and sentenced to transportation, Palmer for seven years, the remainder for fourteen years.<sup>59</sup> The trials were extensively reported in England and Scotland and were widely condemned for the aggressive behaviour of Lord Braxfield and for the extremity and duration of the sentences. This contrasted in the public mind with the courage and forbearance of the defendants before the courts, who attracted considerable sympathy and support which helped the five men earn the epithets of ‘martyr’.

Opposition to the conduct of the trial and the punishments led, in early 1794, to debates in both Houses of Parliament seeking intervention by the Crown to stay the transportation. In the Commons, the principal opponent voicing an understanding of the Scottish law of transportation was William Adam, a Scotsman trained in English law. James Maitland, Earl of Lauderdale, a Scottish representative peer, was one of the most vocal critics in the House of Lords.<sup>60</sup> The

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<sup>57</sup> Robert Dundas of Arniston (1758-1819). Robert Dundas was the nephew and son in law of Henry Dundas. He was solicitor-general for Scotland between 1784 and 1789 and Lord Advocate from 1798 to 1801 when he went to the Scottish bench. See J. A. Hamilton, ‘Dundas, Robert, of Arniston (1713–1787)’, rev. Michael Fry, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/8258>, accessed 9 Dec 2013]

<sup>58</sup> Robert McQueen (1722-1799) was appointed Lord Justice Clerk in 1788, the head of the Scottish criminal judiciary. Michael Fry, ‘Macqueen, Robert, Lord Braxfield (1722–1799)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004. [<http://www.oxforddnb.com/view/article/17738>, accessed 9 Dec 2013]

<sup>59</sup> Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* Volume XXIII, Muir, cols 117-238; Palmer, cols 238-382; Skirving, cols. 391-602; Margarot, cols 603-778; and Gerrald, cols. 804-1012.

<sup>60</sup> James Maitland (1759-1839), 8<sup>th</sup> Earl of Lauderdale, criticised as ‘Citizen Maitland’ or ‘sans-culottes’, was an active supporter of the aims of the French Revolution. Roland Thorne, ‘Maitland, James, eighth earl of Lauderdale (1759–1839)’, *Oxford Dictionary of National Biography*, Oxford

arguments of these opponents reflected the views and criticisms voiced by John MacLaurin, Lord Dreghorn. MacLaurin's arguments were included in a posthumous collection of his works published in 1798 (MacLaurin died at the end of 1796). But it is clear from the overlap in arguments and examples used by both Adam in the Commons and Lauderdale in the Lords at the beginning of 1794 that they were keenly aware of MacLaurin's views.<sup>61</sup>

But how did the trials of the martyrs inform an understanding of transportation from Scotland? In sentencing Thomas Muir before the Court of Justiciary in Edinburgh on 31 August 1793 Lord Braxfield used the following formula:

...the said lords [the trial judges], in respect of the said verdict, in terms of an act passed in the 25<sup>th</sup> year of his present majesty, intituled, 'An act for the more effectual transportation of felons and other offenders in that part of Great Britain called Scotland,' ordain and adjudge that the said Thomas Muir be transported beyond the seas, to such place as his majesty, with the advice of his privy council, shall declare and appoint: and that for the space of fourteen years from this date; with certification of him, if after being so transported, he shall return to, and be found at large, within any part of Great Britain, during the said fourteen years, without some lawful cause, and be thereof lawfully convicted, he shall suffer death as in cases of felony, without benefit of clergy, by the law of England.<sup>62</sup>

A similar form of sentence was used at the trials of the remaining martyrs. No mention was made of any adjudgement of service. To be raised later was the question of any possible return to 'Great Britain'. Prior to 1801 this would have been understood as England (and Wales) and Scotland, but not Ireland.

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University Press, 2004; online edn, Jan 2008 [<http://www.oxforddnb.com/view/article/17825>, accessed 6 Dec 2013]

<sup>61</sup> MacLaurin, "Of the Punishment of Transportation", Volume 2, pp. 58-72. This doesn't mean that the arguments were identical. While carefully grounded in their perceptions of Scottish law Adam and Lauderdale were running a quasi-political campaign. MacLaurin's viewpoint remained firmly anchored in his understanding of Scottish law and an interpretation of 25 Geo III c. 46.

<sup>62</sup> Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, Volume XXXII, p. 236.

The use of certification as a contingent element of the punishment had its roots in Scotland's use of judicial transportation and predates the introduction of statutory transportation in 1766 and its revival in 1785.<sup>63</sup> David Hume pointed out that certification had tended to reflect the punishment for the original offence. William Adam drew the attention of the House of Commons to the anomaly in Muir's sentencing. The crime for which he was convicted was a misdemeanour, but the certificate invoked capital punishment, seemingly at odds with the trend summarised by Hume.<sup>64</sup> There was no process of certification in the English transportation legislation and the early return of an offender to England while still under sentence was applied by statute.

Contemporary Scottish law permitted no appeal from the decisions of the Court of Justiciary. Supporters of Muir and Palmer, the first to be convicted in 1793, took their cause to the parliament in January and April of 1794 in an attempt to petition the King to intervene in the execution of the sentences of transportation. In the House of Commons active and vocal support came from prominent Whig reformers including Charles James Fox, Richard Sheridan, Charles Grey, and the lawyer William Adam who ran the technical legal case.<sup>65</sup> In the House of Lords the Earl of Lauderdale called for Crown intervention into what he described as miscarriages of justice. Defending the Court's decisions in the Commons, as well as representing the preferred position of the government, was Prime Minister William Pitt and the Secretary of State, Henry Dundas.

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<sup>63</sup> See Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes*, p. 369.

<sup>64</sup> *The Parliamentary Register of the House of Commons*, (London, 1794), volume 38, pp 492, 495.

<sup>65</sup> Charles Grey, later the second Earl Gray, successfully moved the Reform Bill through the parliament in 1832. William Adam was a Scot, but trained in England as a lawyer. He had been in parliament since 1774 and was actively seeking Scottish law reform, including the right of appeal from the Court of Justiciary to the House of Lords. See <http://www.historyofparliamentonline.org/volume/1790-1820/member/adaw-william-1751-1839>.



All parliamentary efforts to relieve the defendants from the punishment of transportation were exhausted by the end of April 1794. Orders in council for their transportation had already been approved on 8 and 24 January.<sup>66</sup> William Adam's motion in the House of Commons on 10 March 1794 was defeated, while the efforts of the Earl of Lauderdale in the House of Lords met a similar fate.<sup>67</sup> Following their trials and sentencing and, in the face of unprecedented publicity, the defendants were progressively moved to London for temporary detention in the hulks before being moved to Portsmouth for transportation. Muir, Palmer, Skirving, and Margarot departed for Botany Bay on the transport *Surprize* on 2 May 1794. An order in council for the transportation of Joseph Gerrald was approved on 21 December 1794 and Gerrald was transported to New South Wales as the sole convict on the supply ship *Sovereign* on 25 May 1795.<sup>68</sup>

Despite their futility, the debates in the House of Commons and in the Lords provided rare and insightful contemporary comments on the law and practices associated with transportation from Scotland.<sup>69</sup> Addressing the House of Commons on 10 March 1793 in an attempt to have a review of the Scottish law on sedition, William Adam set out his analysis of the nature of the punishment of transportation. His primary criticism rested on the nature of the charges brought

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<sup>66</sup> PC 2/139, pp. 225-8 and 272-4, TNA. And see Whitehall Evening Post, Saturday, 11 January 1794.

<sup>67</sup> Adam's speech to the Commons is set out in full in *The Parliamentary Register of the House of Commons*, (London, 1794), Volume 38, pp. 489-529. This replaces the text of the speech set out in Volume 37 from p. 501. The earl of Lauderdale's speech to the Lords is set out in the *Parliamentary Register for the House of Lords* (London, 1794), Volume 39, pp. 228-241.

<sup>68</sup> PC 2/141 pp. 428-30, TNA. And see Bateson, *The Convict Ships 1789-1868*. Bateson incorrectly dates the departures of the *Surprize* and the *Sovereign* as being in 1795 and 1796 respectively. See also the *Guide to New South Wales State Archives relating to Convicts and convict Administration*, (Kingswood, 2006), p. 226.

<sup>69</sup> Michael Fry, *The Dundas Despotism* (Edinburgh, 1992), at p. 171, points out that neither Muir nor Palmer would appeal their convictions with the result that their supporters raised the issue in parliament in the hope of a petition to the king for clemency.

against Muir and the relevance of the punishment meted out. In an elaborate argument, Adam pointed out that the relevant offence under Scottish law was the misdemeanour of *leasing-making*, a form of sedition. The punishment for the offence, in accordance with a 1703 act of the Scottish Parliament, was banishment as opposed to transportation. Summarising the punishment of banishment as, 'mere expulsion from the society, country, or realm, to which the expelled person belongs; leaving every other country open to his approach, without restraint', Adam then went on to describe transportation in the following terms:

By transportation I mean not only the expulsion of the person transported from the realm or society to which he belongs, but his being sent to another place, where he cannot quit, and in which he must remain, in a situation of servitude, as in America formerly; or under a military despotism and servitude, as at Botany Bay now. The one is simple expatriation with the power of going anywhere, but deprived of the power of returning home. The other is expatriation with the aggravation of being sent to a stated place in a situation of servitude and confinement in that place.<sup>70</sup>

Adam, like John MacLaurin, based his view about transportation, not only on his views of earlier transportation, but upon his (very contemporary) view of New South Wales based on the recently published commentary of Governor Phillip.<sup>71</sup> To add weight to his argument Adam went on to paint a somewhat civilised picture of transportation to America that might have appealed to Lord Beauchamp ten years earlier. Transportation to America had, according to Adam, involved:

a short and easy voyage to the place of destination; a cultivated and inhabited country, a free and civilised people, speaking our own language, following pursuits similar to our ours, and where servitude might be alleviated by the example of neighbours, and that

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<sup>70</sup> *The Parliamentary Register; or History of the Proceedings and Debates of the House of Commons*, Volume 38, (London, 1794), p. 497.

<sup>71</sup> Arthur Phillip, ed., *The Voyage of Governor Phillip to Botany Bay* (Sydney: 1970). The text had been published in England in 1789. It was noted in Chapter 4 that Phillip may not have been the author. See footnote 91.

tenderness and lenity which are the invariable concomitants of civilization, freedom, knowledge and morality.<sup>72</sup>

Transportation to Botany Bay, in contrast, was of a different order: 'The voyage is long and tedious, and so inconvenient and distressing, independent of the transportation, as to be a much more severe and dreadful punishment, than any which the laws of England would permit to be inflicted for such a crime'.<sup>73</sup> Adam held a highly critical image of Botany Bay. It was surrounded by 'a barbarous and hostile people', while the inhabitants included the 'outcasts of every jail in England, ignorant in mind, abandoned in their morals, and devoid of every quality that belongs to civilized man.' The crux then of Adam's argument was not just that the punishment of the martyrs was not set out in Scots law, but that Botany Bay was an unsuitable place to which 'men whose education and habits have been such as to entitle them to be admitted to the most respectable and most learned professions that exists amongst us.' MacLaurin had been more direct in his criticism and had referred to the martyrs simply as 'Gentlemen'.<sup>74</sup>

Neither Adam nor the Earl of Lauderdale mentioned the adjudgement of Muir's services during their parliamentary speeches. In fact, the Court of Justiciary's judgement with respect to Muir had been carefully enunciated. Demonstrating the greater flexibility in sentencing available to judges in Scotland, Lord Henderland, one of the trial judges, examined the options available to the court once Muir had been found guilty. He canvassed banishment, a fine, whipping, imprisonment, and

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<sup>72</sup> *The Parliamentary Register; of History of the Proceedings and Debates of the House of Commons*, Volume 38, (London, 1794), p. 523.

<sup>73</sup> *Ibid.* John MacLaurin used the same examples, and references to the Governor Phillip's own account of *The Voyage of Governor Phillip to Botany Bay*.

<sup>74</sup> MacLaurin, "Of the Punishment of Transportation", p. 70. Michael Fry has since pointed out that judges of the Court of Justiciary could, in effect, declare new crimes. This contrasts with English judges being bound by statutes and precedent. See Fry, *The Dundas Despotism*, p. 179.

transportation, eliminating all but the last in turn because, Henderland considered, it was necessary to remove Muir from the country to a place ‘where he could do no further harm’.<sup>75</sup> But the issue of adjudgement was not mentioned, by Henderland, or any of the other trial judges. John MacLaurin (Lord Dreghorn) drew the same conclusion.<sup>76</sup> By way of confirmation that Muir’s service had not been adjudged, Lord Cockburn, writing in 1853 about the trials of the Martyrs, included the following anecdote (emphases in the original):

Lord Dreghorn, one of the civil judges, attests that one of the criminal ones told him at the time that the Justiciary judges thought Muir’s “crime so great, that they might HAVE ADJUDGED HIS SERVICES without being over-severe” !!! that is, they might, besides transporting, have made a *slave* of him ; for to adjudge a convict’s service was to give him up by compulsion to a taskmaster.<sup>77</sup>

Whether or not the martyrs’ services had been adjudged led directly to a further point of difference between the English and the Scottish forms of transportation, although this point was largely illusory. Inconsistent with the perception of William Adam and Lord Lauderdale was the fate of the martyrs once they reached New South Wales. If, as Adam and Lauderdale believed, the martyrs, despite being gentlemen, were to be in servitude, then there was no difference between them and any other convict transported from Scotland on the *Surprise* transport in 1794. But the reality, and the understanding of the martyrs themselves, was at odds with this perception. During the debate in the House of Lords, Lord Lauderdale had concluded, citing an apparent comment from Lord Braxfield, that:

in sentencing these persons to be transported to Botany Bay, it was not in contemplation that they should be confined to that place or that they should be prevented from going to

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<sup>75</sup>Howell’s *A Complete Collection of State Trials* etc. Volume 23, (London, 1817), col. 233.

<sup>76</sup> MacLaurin, "Of the Punishment of Transportation", pp. 62-3.

<sup>77</sup> Henry Lord Cockburn, *An Examination of the Trials for Sedition Which Have Hitherto Occurred in Scotland*, p. 181.

any other, provided they did not return here; or that they should be kept in servitude and subjected to control.<sup>78</sup>

At first, MacLaurin seemed to think there was little difference between the English and Scottish approaches to transportation.<sup>79</sup> But he later went on to recognise that the English and Scottish legislation did operate somewhat differently. Apparently unable to resist a nationalistic barb, MacLaurin pointed out (emphasis in the original):

It is understood (I have been well informed) in England, that such a sentence [of transportation] *implies* an adjudication of the service, and is not expressed in the sentences of transportation pronounced there. It must be so understood, if implication be admissible in such a matter: which may well be doubted, as the statute makes the adjudication of the service a pre-requisite. I have heard much of English accuracy in judicial proceedings, but these sentences are, I apprehend, no proof of it.<sup>80</sup>

MacLaurin debunked this argument but, in the process, criticised the behaviour of Braxfield's Court. Reciting essentially the same arguments as Lauderdale, MacLaurin pointed out that it was the Court's intention that once one of the martyrs had been set down at Botany Bay, since his services had not been adjudged, 'he could not be obliged to work, nor be detained; but that he might leave it when he could, and could go to any part of the world, Great Britain excepted'.<sup>81</sup> But not content with this view, MacLaurin saw through the polemics of Adam and Lauderdale and recognised the inappropriateness of the sentences because, he argued, the concept of adjudgement was integral to the sentence of transportation. Dismissing the view that transportation was, in effect, complete when the martyrs set foot at Botany Bay, MacLaurin pointed out that the form of sentence used by Braxfield was in manifest error, 'for, to transport a man to a

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<sup>78</sup> *Parliamentary Register*: House of Lords, Volume 39, p. 237.

<sup>79</sup> MacLaurin, "Of the Punishment of Transportation", p. 61.

<sup>80</sup> MacLaurin, "Of the Punishment of Transportation", p. 69.

<sup>81</sup> MacLaurin, "Of the Punishment of Transportation", pp. 62-3.

place for fourteen years, and at the same time understand and declare that he may leave it when he can, is incongruous and inconsistent.’<sup>82</sup>

Despite MacLaurin’s views, the claim that transportation was completed upon disembarkation persisted. Awaiting transportation from Spithead, on 27 March 1794, Maurice Margarot wrote to Secretary of State Dundas. After seeking clarification about his desire that his wife should accompany him to Botany Bay he went on to pose what he called a ‘constitutional point’:

I wish to know, sir, the extent of my sentence, and of the power which executes it. Arrived at Botany Bay, am I there to be a slave, the transferable property of the King of Great Britain, and be forced to labour under the goad of a task-master—is that to be the lot of an Englishman? or, am I on my landing there to be restored to liberty? and, if so, will that liberty authorize me to remove myself from New South Wales to anywhere in the world not belonging to Great Britain? or must I remain there?’<sup>83</sup>

Dundas appears not to have responded.<sup>84</sup>

The *Surprise* transport arrived in Sydney of 25 October 1794.<sup>85</sup> New South Wales was then under the administration of Lieutenant-Governor Francis Grose who had assumed the role on the departure of Governor Phillip in December 1792. Whether by deliberate decision prompted by the public outcry against the severity of the sentences against Muir and Palmer, or whether cleverly relying on the apparent conflict between the English and Scottish transportation regimes, an immediate outcome of the parliamentary discussions in England in early 1794 was a letter from Under-Secretary John King at the Home Department to Lieutenant-Governor

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<sup>82</sup> MacLaurin, "Of the Punishment of Transportation", p. 66.

<sup>83</sup> *Historical Records of New South Wales* (hereinafter *HRNSW*), Volume 2, p. 853.

<sup>84</sup> 27 March 1794; *HRNSW* Vol. 2, pp. 852-3.

<sup>85</sup> Bateson, *The Convict Ships 1789-1868*, p. 147. Bateson incorrectly records the arrival date as 1795.

Grose in New South Wales. The letter indicated a clear understanding by King of Scottish sentencing. King informed Grose:

It appears necessary to inform you that you are to observe in the Orders in Council for the transportation of the Scotch convicts, that in those cases where their sentences do not transfer their services to the contractor, you are not at liberty to compel their services. On the other hand, they are not entitled to any provision from the Crown without doing such service as you shall think proper to enjoin them.<sup>86</sup>

King's comments were not limited to the five martyrs, but could be construed as applying to all those sentenced in Scotland. Public subscriptions raised in Britain on behalf of the martyrs before the departure of the *Surprise* had raised sufficient money for at least one of the martyrs – Palmer – to pay his own passage and for Margarot to take his wife. The subsequent treatment of the five martyrs would suggest that King's comments were directed only at them.

Under-Secretary King's approach and Lieutenant-Governor Grose's response would appear to represent the triumph of pragmatism over judicial sentencing; nevertheless it raises a few issues. King clearly acknowledged the nature and validity of the sentences from Scotland, both where service was, and was not, adjudged. But did it have wider implications? Writing in 1958 Michael Roe thought that King's approach to the circumstance of the martyrs, once in New South Wales, set the pattern for the later handling of convicts transported for political crimes.<sup>87</sup> This, however, would seem to overstate the case. The last martyr, George Mealmaker, sentenced in Edinburgh in January 1798 to transportation for fourteen years and with no adjudgement of service, was not

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<sup>86</sup> Under-Secretary King to Lieutenant-Governor Grose; 26 April 1794; 1 *HRA* 1, p. 468. The letter arrived with the convicts on the *Surprise*.

<sup>87</sup> Michael Roe, "Maurice Margarot: A Radical in Two Hemispheres, 1792-1815," *Bureau of the Institute of Historical Research*, 31 (1958), pp. 67-78, at p. 72.

treated in the same way as the original five – a point Roe in a near-contemporaneous article on Mealmaker failed to observe.<sup>88</sup>

Governor John Hunter arrived in New South Wales in September 1795. Five weeks later, on 14 October 1795, three of the Scottish Martyrs petitioned him to be allowed to leave New South Wales.<sup>89</sup> The petitioners queried the effects of the sentences of transportation handed down against them in Scotland and argued that, while they remained under punishment of banishment from Scotland, they had completed their punishment of transportation to New South Wales. On 25 October, Hunter referred the petition to the Secretary of State for the Home Department, the Duke of Portland. Hunter expressed some sympathy for the petitioners' argument, pointing out that, 'I cannot feel myself justifiable in forcibly detaining them in this country against their consent.'<sup>90</sup> It was in this context that Hunter made his observations about the customary practices associated with assigning the services of convicts referred to in the thesis Introduction.<sup>91</sup> It is possible that Hunter, a Scotsman, may have had a general awareness of how Scots law managed the punishment of transportation and how, in Scotland, transportation was differentiated from the old Scots punishment of banishment. He was, however, no stranger to the circumstances of the transportation of the Scottish Martyrs in 1794 as he pointed out to Under-Secretary John King of the Home Department while he (Hunter) was still in

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<sup>88</sup> Michael Roe, "George Mealmaker, the Forgotten Martyr," *Journal of the Royal Australian Historical Society*, 43 (1957), pp. 284-97. Mealmaker's sentence is noted in T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, volume XXVI, (London, 1817), columns 1163-4.

<sup>89</sup> The three petitioners were Thomas Muir, Thomas Palmer, and William Skirving. The petition, and Hunter's subsequent letter to London is set out in *HRNSW* Volume 2, pp. 883-5.

<sup>90</sup> 1 *HRA* 1, p. 883.

<sup>91</sup> *Ibid.*



England as governor-designate.<sup>92</sup> In his letter to the Duke of Portland, Hunter displayed no apparent knowledge of the instruction issued by Under-Secretary King to Lieutenant-Governor Grose on 26 April 1794 to the effect that Grose, ‘was not at liberty to compel their service.’<sup>93</sup>

Before considering the situation in which Governor Hunter found himself in October 1795 and the response from London, four events occurred within a short period of time which altered the nature of his dilemma. The first of these occurred on 5 November 1795, with the arrival of Joseph Gerrald on the *Sovereign*. Gerrald had been sentenced to fourteen years transportation on 14 March 1794.<sup>94</sup> An order in council was issued on 31 December 1794 solely for the purpose of the transportation of ‘Joseph Gerald (sic)’. There was no adjudgement of his services.<sup>95</sup> On 27 January 1795 Thomas Shelton contracted with Andrew Towers to transport a single convict from Scotland on the store ship *Sovereign* and charged £4 12s 2d. Probably because of the account covering just one convict, it is more detailed than those made earlier or later. Closer attention was paid to the needs of the Scottish criminal justice system rather than shoehorning the Scottish procedures into an English framework. Some effort was spent on writing to the ‘Crown Agent’ in Edinburgh to have him register the security in the Scottish court. Shelton also listed the cost of an assignment of the convict from the Contractor to the Governor of New South Wales. The *Sovereign* did not leave England until 25 May 1795. According to the State Records of New South Wales, there was no indent prepared for the *Sovereign* and therefore, presumably, no

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<sup>92</sup> Hunter to King, 30 January 1795; *HRNSW*, Volume 2, pp. 872-3.

<sup>93</sup> 1 *HRA* 1, p. 468

<sup>94</sup> Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, Volume XXIII, col. 1012

<sup>95</sup> PC 2/141, pp. 428-30.

assignment of any property in Joseph Gerrald's services to the governor of New South Wales.<sup>96</sup>

The next three events occurred in close proximity. On 18 February 1796 Thomas Muir (one of the petitioners) escaped from New South Wales on the ship *Otter* and went to the United States of America and then to France. In both countries he was welcomed as a hero. On 16 March 1796 Joseph Gerrald died in Sydney.

Three days later, on 19 March 1796, William Skirving (another of the petitioners) also died.<sup>97</sup> And on 11 February, just one week before Muir's escape, the transport *Marquis Cornwallis* arrived from Cork carrying 150 male and 70 female convicts who, as Hunter pointed out to the Duke of Portland on 3 March 1796, carried no assignment papers.<sup>98</sup> Hunter's immediate problem with lack of assignments was therefore quantifiable in the following terms; in addition to the (now) two Scottish Martyrs remaining in New South Wales, some 693 Irish convicts had been delivered into the custody of successive administrators of the colony of New South Wales, but their services had never been assigned.<sup>99</sup>

The response to Governor Hunter came from the Duke of Portland and had been prepared by Lord Advocate Robert Dundas (the prosecutor in the trials before the Court of Justiciary). It was unequivocal.<sup>100</sup> On the issue of a possible return of the martyrs to Ireland Dundas advised that the omission of Ireland from the judgement certificate was irrelevant. Prohibition of an offender returning to Great

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<sup>96</sup> *The Guide to the New South Wales State Archives relating to Convicts and Convict Administration* (Kingswood, 2006), p. 226.

<sup>97</sup> Hunter to Portland, 30 April 1796. 1 *HRA* 1, p. 568.

<sup>98</sup> 1 *HRA* 1, p. 555.

<sup>99</sup> The remaining Martyrs were Thomas Palmer and Maurice Margarot.

<sup>100</sup> Dundas's opinion was dated 5 September 1796 and is set out in *HRNSW*, Volume 3, pp. 111-15. The opinion sent to New South Wales in a letter from the Secretary of State for the Home Department, the duke of Portland, dated 26 September 1796 which is set out in *HRNSW*, Volume 3, pp. 138-9.

Britain or Ireland was a prohibition in accordance with the statute. The omission of Ireland from the certificate, therefore, did not open it up as a possible place of settlement, except under pain of death. On the issue of servitude, Dundas went on to point out that servitude was within the judge's discretion. This had not been awarded in the cases of the martyrs in line with 'innumerable' other instances of transportation from Scotland, which should have been familiar to the colonial authorities.<sup>101</sup> Governor Hunter acquiesced in the advice from London and took the matter no further.

In the view of Lord Advocate Dundas the transportation of offenders from Scotland without the adjudgement of service to the transportation contract meant that a convict was banished to New South Wales for the term of the sentence, but he or she was not in servitude. This must have come as a surprise to the colonial authorities in Sydney. With the exception of the circumstances of the first five martyrs (i.e. including Joseph Gerrald per the *Sovereign* in 1795), all offenders transported from Scotland were regarded as being in servitude on the same terms as any offender transported from England. But whether a surprise or not, it appears not to have led to any perceptible change in convict administration in New South Wales. Did that mean that the colonial authorities simply ignored the distinction, and if so, how?

After the departure of the *Surprise* transport in 1794, the next Scottish convicts to be sent to New South Wales did not leave England until 1800, sometime after the departure of Governor Hunter from the colony. On 14 March 1800 the Privy Council ordered the transportation of 300 male convicts, including four from

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<sup>101</sup> The evidence considered in this thesis with respect to the numbers of convicts from Scotland whose service had not been adjudged would support Dundas's view.

Scotland. One of these, George Mealmaker, the seventh Scottish Martyr, was sentenced on 12 January 1798 by the Edinburgh Court of Justiciary to fourteen years transportation. The services of none of the four Scottish convicts were adjudged to the contractor. These convicts all departed from England on the transport *Royal Admiral* (2) on 20 May 1800.<sup>102</sup> The order in council of 14 March recited only the English statute 24 Geo III c. 56. It did not refer to the Scottish statute 25 Geo III c. 46, nor did it refer to the statute 28 Geo III c. 28 which had authorised Thomas Shelton to enter into the necessary contract.<sup>103</sup> In effect, the construction of the order in council had reverted to that of 1791 prior to the departure of the *Pitt* transport. Two further orders in council were authorised on 29 July 1800 which included the names of seven convicts from Scotland. No services were adjudged and, again, the Scottish legislation was not cited.<sup>104</sup>

From the three orders in council of 1800 it would appear that the processes developed under the administration of Secretary of State Dundas had either been forgotten or ignored. The transportation of convicts from Scotland in the early 1800s followed a similar pattern, but with the services of only a few convicts being adjudged. The position between 1791 and the first transportation of offenders from Scotland in the *Pitt* until 1812 and the despatch of the *Indefatigable* to Van Diemen's Land is summarised in Table 13.

All in all, in the period up to 1812, the number of men and women transported from Britain pursuant to sentences from the Court of Justiciary are summarised in Table 13.

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<sup>102</sup> Bateson, *The Convict Ships 1789-1868*, p. 169.

<sup>103</sup> PC 2/154, pp. 386-95, TNA.

<sup>104</sup> PC 2/155, pp. 369-78, TNA.

**Table 13: Scottish convicts transported to New South Wales and Van Diemen's Land, indicating the number with adjudged service**

Transport vessel	Year	Total No of convicts	Scottish convicts	Number of convicts with services adjudged
<i>Pitt</i>	1791	410	46	3
<i>Royal Admiral</i>	1792	300	7	-
<i>Surprise</i>	1794	83	39	5
<i>Royal Admiral (2)</i>	1800	300	4	-
<i>HMS Calcutta</i>	1803	307	3	-
<i>Indian</i>	1810	200	7	4
<i>Admiral Gambier (2)</i>	1811	200	14	4
<i>Indefatigable</i>	1812	200	5	1
<b>Totals</b>		<b>2100</b>	<b>166</b>	<b>17</b>

**Source:** Bateson, *The Convict Ships 1789-1868*, pp. 186, 338, and 356 and New South Wales State Archives Fiche nos. 631, and 633.

The conclusion to be drawn from Table 13 is that of the convicts transported from Scotland during the period 1791 to 1812 only 17 or 10% were the subjects of adjudgement of services. That is, from the point of view of the sentencing judge in Scotland and the order in council, a clear separation had been made with respect to their transportation to New South Wales (and Van Diemen's Land) and whether or not there was any transmissible property in their services which could be assigned to the governor of New South Wales. The difference in the application of the English and Scottish understandings of the status of transported convicts does not appear to have generated contemporary comment other than the opinions of John MacLaurin mentioned earlier.

Turning now to the third question to be considered in this Chapter: how were differences between the two parallel systems of transportation resolved?

Sometime between December 1810 and the end of 1814, Andrew Stewart, a convict in New South Wales, made representations to the Home Department in

London. Judging by the subsequent response of Governor Macquarie, it would appear that Stewart had approached the Home Department in London without reference to the governor.<sup>105</sup> Stewart claimed that his sentence to transportation had been incorrectly recorded in colonial records. He explained that he had been capitally convicted in Edinburgh in January 1809, but the sentence had been commuted to transportation for life, ‘with an enactment in such Commutation of sentence for the Contractor to have his service for Seven Years.’<sup>106</sup> The basis of Stewart’s representation to London was that no notice had been taken in New South Wales of the seven year enactment provision of the sentence. Stewart’s representation met with support in London. Lord Sidmouth, the secretary of state for the Home Department, directed his under secretary, John Beckett, to send a memorandum to the Colonial Office to rectify Stewart’s records in Sydney. Beckett’s response was sent to the Colonial Office on 21 April 1815 and a copy sent by Lord Bathurst, the Secretary of State for War and the Colonies, to Governor Macquarie on 28 July 1815. In his advice to the Colonial Office, Beckett went further than just addressing Stewart’s case, pointing out that three other convicts named in ‘the same assignment’ would also be affected.<sup>107</sup> The advice of Under-Secretary Beckett on Andrew Stewart’s sentencing accepted that Stewart had indeed been sentenced to transportation for life, but that the judgement included the provision that ‘the Contractor to have his service for Seven Years’. Beckett’s approach to the issue therefore suggests that, at the time

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<sup>105</sup> 1 *HRA* 9, p. 50. The date of Stewart’s representation to London is unclear. The vessel on which he was transported to New South Wales, the *Indian*, arrived in December 1810 (Bateson, *The Convict Ships 1789-1868*, p. 338. See more on this below.

<sup>106</sup> Quoted in Beckett’s Memoranda enclosed in Earl Bathurst’s dispatch to Macquarie dated 28 July 1815. 1 *HRA* 8, p. 627, at p. 628.

<sup>107</sup> *Ibid*, p. 629. The ‘assignment’ was for convicts transported to New South Wales on the *Indian*. SRNSW: Fiche 633, p. 357. Stewart was also mentioned in John McGowan’s analysis of the Edinburgh records. See McGowan, *A New Civic Order: The Contribution of the City of Edinburgh Police, 1805-1812*, pp. 152, 229.

of his opinion in April 1815 (considered below), he had no difficulty with the idea of Scottish sentences of transportation being somewhat different in effect to those from England.

Whether Governor Macquarie was surprised by the unsolicited comment from London, or whether he was genuinely anxious for guidance on how to handle the matter, he responded to London on 13 March 1816 seeking further advice from Earl Bathurst. At first, without directly referring to Stewart's case, Macquarie pointed to an on-going difficulty:

In the Indents sent hither with Convicts, the Sentences from the Scotch Court run not unfrequently in the following terms: 'For Life, the Contractors to have his (or her) services for—years from—date.'<sup>108</sup>

Macquarie went on:

This qualification, or double Sentence of *Life and Years*, creates the difficulty in question, and renders it doubtful whether a Prisoner under such a such a Sentence shall, after the term of years have expired for which his Servicers are enacted to the Contractor become ipso facto Free, in like manner as a Prisoner under Sentence for a limited Period only; or whether He shall, on the expiration of the term of years so enacted to the Contractor, or to this Government, be then *only* entitled to an exemption from that Service to the Contractor, or to this Government, but still remain under the other part of the Sentence, an Exile here *for Life*.

Macquarie indicated to Earl Bathurst that he inclined towards the first interpretation, suggesting that the provision which expressed 'transportation for Life' created ambiguity and could be omitted. Macquarie then referred specifically to Andrew Stewart's case, confirming the accuracy of Stewart's petition to London regarding the enactment of his services to the contractor for seven years. Unfortunately, for Stewart, Macquarie then went on to point out that

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<sup>108</sup> 1 HRA 9, p. 50.

the term of Stewart's service was calculated from the date of the commutation and not the original sentence.<sup>109</sup>

London's response came in two letters from Earl Bathurst, the juxtaposition of which can cause confusion because of their dates and seeming conflict. In the first letter, dated 21 April 1817, Earl Bathurst reported that he had referred Macquarie's 'difficulty' about the Scottish sentencing to the Home Department. A reply, prepared by Under Secretary Beckett on 11 February 1817, was enclosed.<sup>110</sup> In a second letter, dated the following day—22 April 1817—Bathurst forwarded a second opinion which conflicted with the first. The second opinion was summarised by Under-Secretary Beckett on 25 March 1817, but had been written by the Law Officers of the Crown.<sup>111</sup> By way of a postscript, according to the delivery dates, the letters arrived in New South Wales in the reverse order in which they had been written. According to the delivery information noted in Volume 9 of the *Historical Records of Australia* Bathurst's letter of 21 April 1817 arrived in Sydney on 30 September 1817, whereas his letter of 22 April 1817 arrived a month earlier on 29 August 1817.<sup>112</sup>

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<sup>109</sup> *Ibid.* Andrew Stewart may have been loose with his dates. Macquarie was correct that Stewart still had some of his seven year sentence to run.

<sup>110</sup> Bathurst to Macquarie, 1 *HRA* 9, p. 382. John Beckett 1775-1847 was under secretary between 1806 and 1817 and, prior to that, had been a barrister of both the Inner and Middle Temples. In 1818 he became a member of parliament. <http://www.historyofparliamentonline.org/volume/1790-1820/member/beckett-john-1775-1847>. Accessed 31/3/14

<sup>111</sup> Neither Beckett nor Bathurst provided any date for the opinion of the Law Officers, nor do they offer any guidance as exactly what issues the Law Officers were asked to consider.

<sup>112</sup> According to FW Watson, the editor of Volume 9 of the *Historical Records of Australia*, the letter of 21 April 1817 was carried on the transport *Lord Eldon* which departed England on 9 April 1817. Either the date of the letter or the sailing date of the vessel is in error. The *Lord Eldon* arrived in Sydney on 30 September 1817: See 1 *HRA* 9, p. 382. Bathurst's letter of 22 April 1817 was carried on the transport *Almorah* which departed England on 26 April 1817 and arrived in Sydney on 29 August 1817. See 1 *HRA* 9, p. 383. Macquarie acknowledged the receipt of both letters on 12 December 1817 without comment. See 1 *HRA* 9, p. 708.



In his advice to Lord Bathurst of 11 February 1817, Beckett addressed only Macquarie's inquiry about the meaning of the double sentences. Consistent with his position in April 1815, Beckett explained that the sentences of the Scottish courts which imposed transportation for life in addition to service to the contractor for a term of years implied that the 'Prisoner is bound to Serve the Contractor or his Assigns for the term of Years therein expressed.' But, 'at the Expiration of which Term such Prisoners are no longer liable to Servitude, but it does not relieve them further.' The 'Sentence of Transportation from the United Kingdom (for whatever term that may be) still remains in full force.'<sup>113</sup> Beckett's observations then had the effect of confirming Macquarie's framing of Andrew Stewart's punishment as a 'double sentence'. It also confirmed the advice of Lord Advocate Robert Dundas given to Governor Hunter some twenty years earlier and consolidated a difference between English and Scottish sentencing practices. Unlike Dundas's advice, Beckett's advice made no mention of the status of an offender transported to New South Wales without any adjudgement of service. Earl Bathurst's second letter, however, suggested an altogether different course. The second letter contained an attachment, prepared by Beckett on 25 March 1817, six weeks after his own earlier advice, but which quoted what appeared to be the entire text of an opinion from the Law Officers of the Crown.<sup>114</sup> Neither Beckett nor Earl Bathurst offered any comment on the variances nor made any attempt to rationalise them. Bathurst's second letter had been initiated by 'doubts' that had arisen:

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<sup>113</sup> 1 HRA 9, pp. 382-3.

<sup>114</sup> The Law Officers of the Crown were Attorney General Sir William Garrow and Solicitor General Sir Samuel Shepherd. Both held office between 4 May 1813 and 7 May 1817).

in the Minds of many in the Colony under your Government with regard to the Legality of compelling the Convicts, that are transported to New South Wales, to Hard Labour during the period of the Sentence'<sup>115</sup>

There is no obvious trigger recorded in the *Historical Records of Australia* in terms which might have initiated Bathurst's letter of 22 April 1817, other than a discussion on the status of convicts from Scotland generally and the status of the convict Andrew Stewart. What had prompted Bathurst (or Beckett, perhaps) to seek the further advice of the Law Officers of the Crown is not readily explained. The opening words of Bathurst's letter: 'As some doubts appear to have arisen in the Minds of many in the Colony under your Government', suggests a wider issue and coincides with the early formulation in Bathurst's mind about the nature of transportation as a punishment, a formulation which was to lead to the appointment of Commissioner John Thomas Bigge to inquire into the State of the Colony of New South Wales two years later. By having Beckett quote the opinion of the Law Officers and not set out a copy of the opinion itself, it is not possible to understand what query was sent to the Law Officers in the first place.

The Law Officers framed their advice around two central themes; the history of the transportation legislation, and the centrality of the role of the (transportation) contractor. In framing their opinion, the Law Officers seemed to have formed the view, albeit, without specifically mentioning the Scottish practice, that, by adding a term of service to a term of transportation, a judge was trying to impose an additional term of hard labour upon a transported convict. But first they took the opportunity to dismiss any idea that a transported convict was free upon reaching New South Wales. Setting out a brief history of transportation, they opined that a

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<sup>115</sup> 1 *HRA* 9, p. 383.

transported convict was not a ‘Freeman’ but, ‘on the contrary, he is subject to a “State of Servitude” during the term [of transportation]’.<sup>116</sup> This position they contrasted to that of ‘a self-transport (an indulgence sometimes granted)’ and transportation ‘under a Contract’. The self-transport becomes a free man but cannot return to Britain during the term of the sentence.

The opinion of the Law Officers then turned to the issue of hard labour, pointing out that it had only once been addressed in legislation and that had predated 4 Geo I c. 11 in 1717. Later they looked to the rationale of the legislation restating the idea from the recital of 4 Geo I c. 11 to the effect that, ‘it appears that one object was to provide servants in His Majesty’s Colonies in America, who by their Labour and Industry might be the means of improving them[selves]’.<sup>117</sup> Hard labour, then, was not a necessary corollary of servitude; rather, it was servitude and therefore did not need to be stated separately.

Dismissing the idea of a discretionary application of servitude at the behest of the trial judge, but without referring specifically to the Scottish legislation or prior practice, the Law Officers looked to what they referred to as the ‘positive provisions of the Statute’ and concluded that the operation of the legislation conferred servitude, not the decision of the judges. And servitude arose not from judgements but from the role of the contractor. From 4 Geo I c. 11 to the ‘present time’, they argued, all statutes have enacted that offenders shall ‘be transferred to the Person who shall contract to Transport Him, and that the Person so contracting or his Assigns, shall have a Property in the Service of such offenders during the

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<sup>116</sup> 1HRA 9, p. 384. The Law Officers argued that the only statute inflicting the Punishment of Transportation which referred to hard labour was the 1670 statute 22 Car II c. 5 [cloth from racks, munitions, etc] but this is limited to particular offences.

<sup>117</sup> 1 HRA 9, p. 385.

Term for which He is sentenced to Transportation'.<sup>118</sup> The role of the contractor was at the forefront of their minds. The Law Officers then drew their conclusion in wording which closely reflected the views of John MacLaurin some thirty-three years earlier:

The positive Provisions of the Statute Subject to a State of Servitude every convict, on whom the sentence of Transportation has been pronounced. The Court, who adjudged the Offender to be Transported, cannot make it a part of the sentence that he should be kept to hard Labour; it would be an erroneous judgement.<sup>119</sup>

The Law Officers made no allowance for the differences in wording between the English and Scottish legislation as set out in Table 12 above. In dismissing the idea of a judge determining service, or as the Law Officers put it – the right to compel convicts to perform hard labour – ‘they are relying on the words of the sentence alone’.<sup>120</sup>

While seeming to close off the discretionary approach of Scottish sentencing, the opinion of the Law Officers was not without difficulty and seemed to be based on an incomplete understanding of the actual processes and practices of transportation to New South Wales. The Law Officers appeared to contemplate that the governor of the colony could assign a convict to a third party directly from the transportation contractor, suggesting that some convicts were not assigned to the governor at all, albeit at the instigation of the governor. Thus:

The Law could not well be altered in this respect without defeating the object of supplying Settlers with Labourers and Servants: for if they were to be Sentenced to hard labour, or all assigned to the Governor alone, they must be kept to hard labour by the Officers of the Public, and none would be employed in the Service of Private Masters.<sup>121</sup>

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<sup>118</sup> *Ibid.*

<sup>119</sup> 1 *HRA* 9, p. 384. See also MacLaurin, "Of the Punishment of Transportation", p. 66.

<sup>120</sup> 1 *HRA* 9, p. 385.

<sup>121</sup> 1 *HRA* 9, p. 385.

This view conjured up a view of colonial New South Wales akin to colonial America or Lord Beauchamp's vision of a settlement at Das Voltas and not the reality of Governor Macquarie's administration or, indeed the colonial practice since 1788.

The Law Officers treated servitude and hard labour as facets of the same argument. At the same time, however, they appeared to recognise that an assignee of the transportation contractor had considerable discretion as to how this 'hard labour' could be extracted. The assignee 'is not bound to employ the Convict in Labour unless he shall think fit, for having a property in his Service he may exercise such Right of Property with more or less indulgence as he pleases.'<sup>122</sup> A little later they observed, 'We repeat the Convict is not a free man upon his arrival ... but is bound to perform such Labour as the person to whom he is assigned shall allot him.'<sup>123</sup> This view seems to confuse the place of hard labour (which was not mentioned in the legislation, but was mentioned in the hulks legislation and the Penitentiary Act of 1779) and transportation, while underscoring the centrality of the property nature of servitude.

Faced with seemingly conflicting opinions on his need for clarification about the implementation of the double sentences, Governor Macquarie appears to have accepted the advice from London without comment. Perhaps the order in which Earl Bathurst's two letters were received in Sydney would have resulted in Macquarie simply ignoring the views of Under-Secretary Beckett attached to Bathurst's first letter. It is not clear whether the opinion of the Law Officers ended the practice of double sentencing. The issue was not raised again in connection

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<sup>122</sup> 1 *HRA* 9, p. 384.

<sup>123</sup> *Ibid.*

with offenders transported from Scotland. Nor is it clear what happened to convicts from Scotland such as Andrew Stewart with a sentence of transportation for life together with a sentence of service to the contractor for seven years. From the opinion of the Law Officers it would appear that Governor Macquarie would have been right to read Stewart's sentence as being for transportation, and therefore servitude, for life. But this would have been a perverse outcome. Given the greater flexibility in sentencing (hitherto) available to a Scottish judge, it is clear from the analysis of John McGowan's work mentioned below and the comments of Lord Braxfield mentioned by Lord Cockburn that Scottish judges, except in the case of capital sentences, determined punishments against a hierarchy. This hierarchy placed transportation with adjudgement at the top, then transportation without adjudgement, then self-transportation and banishment from Scotland at the bottom. However, once the Scottish offender reached New South Wales this hierarchy was upset and the sentencing intention of the Scottish judge thwarted. Omitting self-transportation and banishment, since none to New South Wales are recorded, it is clear that, with the exception of the first five Scottish Martyrs, transportation to New South Wales without any adjudgement of service was treated as transportation in servitude for life. The qualification of servitude was turned on its head.

This analysis of transportation from Scotland for the period prior to 1817 leaves open the question: how were Scottish sentences interpreted in New South Wales and in London before the 1817 opinion of the Law Officers? The evidence from the indents suggests, with some exceptions, the sentences of convicts transported from Scotland were simply recorded as being for life or a term of years.

Meanwhile, the English view about Scottish sentencing appears to have been confused. As discussed above, at some time prior to the Privy Council meeting to approve the despatch of Scottish convicts to New South Wales on the *Royal Admiral* in 1792, differences in the English and Scottish implementation of transportation must have been apparent to some officials in the Home Department and the Privy Council Office. But nothing appears to have come from this realisation. The impending despatch of the first four Scottish Martyrs from England had prompted Under Secretary-King to advise Lieutenant-Governor Grose in April 1794 that the martyrs would not be required to work unless they were to make demands on the government store; the circumstance of the Scottish Martyrs appears to have been an exception.<sup>124</sup> The first five martyrs arrived with sufficient financial resources not to have to make demands on the stores, but whether they were exempt from servitude may have been as much an issue of their class – their being gentlemen – as it was about London’s apprehension of them being punished too much. Class issues only occasionally appeared as an issue of convict administration in the period prior to 1817. In 1800 Governor Hunter expressed his concerns to the Duke of Portland about recently arrived Irish convicts. These convicts, he reported:

have been either bred up in a genteel life, or to professions unaccustom’d to hard labor. Those are a dead weight on the public store; and really, my Lord, notwithstanding we cannot fail to have the most determin’d abhorrence of the crimes which sent many of them here, yet we can scarcely divest ourselves of the common feelings of humanity so far as to send a physician, a former respectable sheriff of a county, a Roman Catholic priest, or a Protestant clergyman and family to the grubbing hoe or timber carriage.<sup>125</sup>

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<sup>124</sup> Under-Secretary King to Lieutenant-Governor Grose, 26 April 1794, 1 *HRA* 1, p. 468.

<sup>125</sup> Hunter to Portland, 20 March 1800: 1 *HRA* 2, p. 472, at 475.

The arrival of the Scottish Martyrs in 1794, with independent means, disrupted this cycle in New South Wales, but not in Scotland: and, even then, only for the particular circumstances of the first five martyrs, and not the seventh.

Perhaps the most profound analysis of the situation of a convict in New South Wales with respect to the adjudgement of service came from John MacLaurin. In his criticism of the Court of Justiciary's 1794 decision in Muir's case, MacLaurin examined the proposition that, because adjudgement was a discretionary power, it was contended by opponents that it was a less, rather than a more, severe punishment. While MacLaurin had some antipathies generally towards transportation, he was prepared to see old transportation to America in a more benign light. Importantly, he focussed on the issue of maintenance; not quite in the terms of Under-Secretary King's advice to Lieutenant-Governor Grose, but to a comparable effect. Referring to pre-1785 transportation from Scotland, MacLaurin wrote:

When a man was transported to America, and his service was adjudged for a term of years, his fate was defined; he knew what he was to suffer, and how he was to be maintained. If his service was not adjudged, the punishment was not very severe, as the climate was not dangerous, nor even unhealthy, and the situation of the country such, as that he needed not want of work if willing to take it.

But when it is allowed to transport a man to *any* place on the globe; it is plain that a much severer, and, indeed, a capital punishment may be inflicted, under the appearance of an arbitrary [discretionary] one. If the climate be very unhealthy, he runs great risk of being killed by it, as was the fate of many transported to Africa. But suppose the climate not dangerous; suppose Mr Muir to be set down at Botany Bay, and that the Governor will have nothing to do with him, because his service is not adjudged, nor any power given over him; what is to become of him? he may work for his bread: What if he cannot get work? What if (as is most probable) by the time he get there (sic) he be unable to work? – he must die.<sup>126</sup>

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<sup>126</sup> MacLaurin, "Of the Punishment of Transportation", pp. 68-9.



Under-Secretary King was probably unaware of MacLaurin's views, but he would most likely have supported both the sentiment and the practicality of putting convicts from Scotland for whom service had not been adjudged in to service, that is servitude, in New South Wales. An indication of the extent to which differences in Scottish and English sentences were understood in New South Wales is to be found in the practice instituted in 1815. On 2 March 1815, Earl Bathurst wrote to Governor Macquarie complaining about the lack of reports from New South Wales as to the 'present condition' of the convicts who were in the Colony. In future, annual returns were to be sent to London every January providing details against a pro-forma supplied from London. Departing from the indents and the orders in council, the annual return was to specify, in alphabetical order, the names of convicts, the dates of their arrival in the colony, the period for which each was transported, how each was disposed of, and whether each was still resident in the Colony.<sup>127</sup> In the process of submitting these returns any statement of the adjudgement of service, or non-adjudgement, appears to have been both ignored and omitted. If this practice had not already occurred by 1815, both Sydney and London got used to overlooking the fact of variations in the practices of transporting convicts from Scotland and the implications of Scottish sentencing. Records sent from New South Wales to London prior to 1815, and now in the Home Office files at the National Archives at Kew, show an earlier and similar usage.<sup>128</sup>

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<sup>127</sup> Bathurst to Macquarie, 2 March 1815: 1 *HRA* 8, pp. 436-7.

<sup>128</sup> See Home Office Convict Transportation Register, 1787-1809, HO 11/1, (TNA) which is a catalogue of convicts sent to New South Wales prior to 1815 which omits any reference to adjudgement of service of convicts from Scotland.

Before leaving consideration of the use of adjudgement, it is necessary to consider one other aspect of the differences between English and Scottish law with respect to transportation: how did transportation, banishment, and self-transportation co-exist?

When transportation from Scotland was revived in 1785 by the statute 25 Geo III c. 46, one provision was copied directly from its English counterpart; the idea of an offender being ‘authorised to transport himself or herself’.<sup>129</sup> As mentioned earlier, the use of self-transportation was occasionally recorded in the records of the Home Department. The written communication of the Secretary of State to the trial judge seems to have been sufficient to authorise an offender in such circumstances to leave England at their own cost and to go where they pleased and were able to afford. The Law Officers, in their opinion cited by John Beckett to Earl Bathurst above, made special mention of ‘self-transport’ and their free status, but their differentiation was based on the sole rationale of there being ‘no contractor involved’ in their expatriation.<sup>130</sup> The use of self-transportation from Scotland prior to 1776 and the practice of offenders offering themselves up for transportation before trial was noted by Roger Ekirch.<sup>131</sup> The practice of self-transportation from Scotland after 1785 has not been subjected to any systematic study. One question that remains to be considered, however, is how did self-transportation and banishment operate alongside statutory transportation?

William Adam, in his speech to the House of Commons in 1794, saw banishment as another form of self-expatriation, leaving ‘every other country open to his

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<sup>129</sup> See section 1 of the statute.

<sup>130</sup> See above and 1 *HRA* 9, p.384.

<sup>131</sup> Ekirch, "The Transportation of Scottish Criminals to America During the Eighteenth Century", p. 369.

approach, without restraint': that is, he was a freeman.<sup>132</sup> Transportation, on the other hand, at least from an English viewpoint, contemplated servitude. In Scotland, at least until 1817, servitude, through the mechanism of adjudgement was a discretionary element of the punishment of transportation and was rarely applied. The statute covering transportation from Scotland, 25 Geo III c. 46, while it focussed on the processes of transportation from Scotland, also referred to the longstanding practice of judicial banishment. However, nothing in the statute suggested any guidelines as to when transportation should be utilised instead of banishment. By examining the use of banishment alongside transportation it is possible to draw some tentative conclusions. There is no suggestion that transportation and banishment were seen at the time as facets of the same punishment of expatriation – although it might be possible to make such a case.

The evidence upon which the following hypothesis is based is drawn from a very narrow sample of cases before the Court of Justiciary sitting in Edinburgh between 1800 and 1812 and research into the activities of the Edinburgh Police carried out by the Scottish forensic historian John McGowan.<sup>133</sup> When integrated with the sentences of transportation applied to Scottish convicts over the same period (with or without the adjudgement of services), it is possible to develop a hierarchy of culpability against which to measure the use of sentences of banishment and of transportation. Using the data in McGowan's Table 4 it is possible to provide some rationale for banishment and transportation sentences

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<sup>132</sup> *The Parliamentary Register, or History of the Proceedings and Debates of the House of Commons*, Volume 38, p. 497.

<sup>133</sup> McGowan, *A New Civic Order: The Contribution of the City of Edinburgh Police, 1805-1812*.

along the following lines.<sup>134</sup> In the period 1800 to around 1806 the number of sentences of banishment outweighed those of transportation. Pleas of guilty to crimes against property resulted in sentences of banishment from Scotland for terms of between seven years and life, while pleas of guilty in cases of culpable homicide led to banishment for three years. On the other hand, cases of homicide that resulted in findings of ‘not proven’ also resulted in banishment for life, as did cases of child murder. Contentious cases of homicide could result in banishment for only five years. After 1807 sentences of banishment from crimes tried in Edinburgh almost ceased, to be replaced by transportation. Crimes against property, including housebreaking, possibly exacerbated by being done by a servant, or in concert with others, resulted in sentences of transportation for fourteen years or life but with no adjudgement of service. Cases involving capital conviction (child stealing, highway robbery, or multiple thefts) but followed by respite and transportation could result in transportation for fourteen years or life, with adjudgement of services for seven years.<sup>135</sup> This brief analysis does not mean to imply that banishment from Scotland disappeared. As late as 1819 a bill was introduced into the House of Commons to prevent criminals banished from Scotland from proceeding either to England or to Ireland.<sup>136</sup> The bill did not proceed, but it is evidence of a continuing concern in Scotland about the punishment of banishment, if not of its actual use.

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<sup>134</sup> McGowan, *A New Civic Order: The Contribution of the City of Edinburgh Police, 1805-1812*, pp. 138-61.

<sup>135</sup> As in Andrew Stewart’s case mentioned above.

<sup>136</sup> Bill dated 10 June 1819. *House of Commons Sessional Papers* No. 439. *A Bill to prevent Criminals banished from Scotland from taking refuge in England or Ireland, and to extend the power of Banishment and Transportation, etc.*

The following conclusions can be drawn from the Scottish transportation experience between the revival of transportation after 1 June 1785 in accordance with the statute 25 Geo III c. 46 and the opinion of the Law Officers of the Crown appears to have ended the practice from Scotland. Transportation from Scotland differed from that of England because the judges of the Court of Justiciary, using the language of the statute, believed they had a discretionary power to adjudge a convict's service. This discretionary power was used in only 10% of transportations prior to the end of 1817. The impression gained from all the evidence, scant though some of it presently is, was that the judges adjudged service in order to intensify their perception of the punishment of transportation. But once the convict arrived in New South Wales any distinction between an adjudgement of service and non-adjudgement of service was ignored. All Scottish convicts, irrespective of the form of sentence, were regarded as being in servitude for the greater of their double sentences: the circumstances of five of the Scottish Martyrs being exceptions. The approach adopted in New South Wales was the result of assumptions about the nature of the punishment of transportation made in Sydney and not as the result of any careful observance of the judgements of the Court of Justiciary. If this conclusion is correct, then a supplementary question needs to be considered: how could the colonial authorities in New South Wales ignore the law of Scotland? The answer to this question will be considered in Chapter 7.

There is one possibility about how apparent differences between Scottish sentencing and the effects of the double sentence might have been resolved, at least under Governor Macquarie. As is considered in Chapter 8, at the behest of

Earl Bathurst, Commissioner Bigge carried out an inquiry into the state of the colony of New South Wales. One of Bigge's many criticisms of Macquarie was that, having published general regulations about the availability of tickets-of-leave, Macquarie, according to Bigge, repeatedly broke his own rules. While this cannot yet be demonstrated satisfactorily, it is not impossible to believe, given Macquarie's concerns about the double sentencing of convicts from Scotland, that Macquarie applied tickets-of-leave and remissions in order to implement the sentences of the Court of Justiciary. The records of individual offenders maintained on the Queensland State Library convict database website fail to indicate whether this practice was utilised or not.

## **Chapter 7: The status of convicts in early New South Wales**

When Governor John Hunter complained to the Duke of Portland in October 1795 that he had not received an assignment of the servitude of the Scottish martyrs, he was commenting not only about the 'customary' processes that had been devised in England over the winter of 1786 and 1787 to transfer property in the service of transported offenders to the governor of New South Wales. He was also commenting on the practices that had evolved in the colony since 1788. In Chapter 4, the processes designed in England to meet the requirements of the 1784 statute 24 Geo III c. 56 which authorised transportation from England were examined and it was clear that, on some occasions, proper processes were not fully implemented. Lack of any proper process prior to 1798 with respect to the transportation of offenders from Ireland was considered in Chapter 5, while differences between sentencing of offenders transported from England and Scotland was considered in Chapter 6. This Chapter will attempt to reconcile the conflicting positions between what London thought it had established for the management of convicts and what was actually implemented in the colony. This reconciliation is considered through two questions: first, how was the status of the convicts of the First Fleet determined once they arrived in New South Wales? Second, how was the status of the convicts who arrived subsequently determined? Using these two questions this chapter attempts to address the underlying contradiction at the heart of transportation. Prior to 1775, offenders were punished by being sent to the American colonies where colonial laws placed them into servitude. How was the same punishment brought about in New South Wales?

Looking first at the question: how was the status of the convicts of the First Fleet determined once they arrived in New South Wales? In the literature, it is generally assumed that the convicts of the First Fleet were prisoners from England serving sentences in New South Wales. This view is evident in Governor Hunter's concerns mentioned above to the effect that the 'customary' processes had not been observed so that the Scottish martyrs and convicts arriving from Ireland might not have been placed in servitude. Later, more populist views saw New South Wales and Van Diemen's Land as British gaols and convicts as prisoners serving sentences under British law, or at least at the direction of British officials in London. In 1999, Alan Atkinson perceptively described this as the 'system', and nominated *The Fatal Shore* by Robert Hughes as an exemplar of this view.<sup>1</sup> A more analytical view was adopted by Alan Atkinson himself and by Bruce Kercher (citing Atkinson), who both considered this issue and who both concluded that, since the government already owned the labour of convicts, the transportation contractor was obliged to assign the labour of the convicts to the colonial governor.<sup>2</sup> While the conclusions reached by Atkinson and Kercher on this issue are correct for the period after the enactment of 5 Geo IV c. 84 in 1824, prior to the enactment intervening processes were required and those processes were more intricate than has generally been appreciated. At the same time, neither Atkinson nor Kercher contemplated circumstances where, for a range of reasons,

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<sup>1</sup> Alan Atkinson, 'Writing About Convicts: Our Escape from the One Big Gaol.' *Tasmanian Historical Studies*, 6 (1999), pp. 17-28, at p. 21. Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787-1868* (London, 1987).

<sup>2</sup> Alan Atkinson, "The Free-Born Englishman Transported: Convicts Rights as a Measure of Eighteenth-Century Empire," *Past and Present*, No. 144 (1994), p. 108, and Bruce Kercher, 'Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850', *Law and History Review* 21 (2003), pp. 527-584, at p. 544.



no actual assignment occurred.<sup>3</sup> One useful commentator was the Australian historian Bert Rice whose observations on this matter are considered below.

One factor contributing to the absence of any examination in the literature as to the consequences of process failure at the assignment of arriving convicts to the governors of New South Wales was the absence of any contemporary comment. Shortcomings in the transportation process would not have become common knowledge until the publication in England in 1798 of David Collins's *An Account of the English Colony of New South Wales*.<sup>4</sup> Collins referred to the failure of the shipping contractors to deliver the appropriate documentation.<sup>5</sup> Collins's remarks were noted by Jeremy Bentham in 1802, but Bentham's criticisms drew little response from government in London.<sup>6</sup>

Another contributing factor may have been the absence of any analysis of the processes of assigning the services of convicts to colonial governors in the 1822 report of Commissioner John Thomas Bigge into the state of New South Wales. Bigge's report is considered in Chapter 8. For the present, it should be noted that, while Bigge examined in detail the procedures implemented by colonial authorities in both New South Wales and Van Diemen's Land on the arrival of convict transports, and oversaw the levels of security attached to the indent

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<sup>3</sup> As explained in Chapter 4, Atkinson appeared to rely on Byrnes's incorrect conclusions from the legislation of 1776.

<sup>4</sup> David Collins, *An Account of the English Colony of New South Wales* (London, 1798).

<sup>5</sup> Collins, *An Account of the English Colony of New South Wales*, pp. 60-1.

<sup>6</sup> Jeremy Bentham, "A Plea for the Constitution: shewing the Enormities committed, to the oppression of British Subjects, innocent as well as guilty, etc.", in *The Works of Jeremy Bentham* (Edinburgh, 1838), pp. 250-84, at p. 251. In 1978 Alan Atkinson pointed to connections between Bentham and David Collins in London, and also to the fact that 'A Plea for the Constitution', though it was printed privately, was not published and remained scarce. See Alan Atkinson, "Jeremy Bentham and the Rum Rebellion", *Journal of the Royal Australian Historical Society*, 64 (1978), p. 2.

documentation, he omitted any consideration of property in the service of the offender or its utilisation or any possible failure in its transmission.<sup>7</sup>

There is an additional problem as well. In the literature, much attention is paid to the concept of the 'Free-born Englishman', an argument which gives the impression that transportation can be seen in the light of English law and the reach of English institutions.<sup>8</sup> But, as had been demonstrated in this thesis, the legal framework for transportation was always more complex. It was not specifically stated, but in 1786 and 1787, the plans for the settlement at Botany Bay contemplated transportation of offenders in English gaols and the hulks in southern England. No mention was made then, or later, of offenders being transported to New South Wales from any part of Great Britain other than England. This English-centric approach persisted even when the issue was raised with London by Governor Hunter and, later, by Governor Macquarie. Further examples of lack of response from London can be seen in circumstances already mentioned. London responded to Governor Hunter's query about the status of the convicts from Ireland by referring the matter to Dublin Castle. This resulted, eventually, in the enactment of the Irish statute 38 Geo III c. 59 in 1798.

However, no consideration was given at the time to the circumstances of the convicts transported from Ireland prior to the enactment.<sup>9</sup> Similarly, the opinion of Lord Advocate Robert Dundas in 1796 that 'innumerable' convicts transported from Scotland would not have had their service 'adjudged', had no impact on the

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<sup>7</sup> House of Commons Parliamentary Papers: 19 June 1822 (448) *New South Wales. Report of the commissioner of inquiry into the state of the colony of New South Wales*. (Hereinafter called the Bigge Report), p. 168

<sup>8</sup> See, for example, Atkinson, 'The Free-Born Englishman Transported'.

<sup>9</sup> See the discussion in Chapter 5.

treatment of such offenders in New South Wales, nor was any effort made at the time to modify the laws in Scotland.<sup>10</sup>

So, in seeking to understand what the status of the convicts of the First Fleet would have been once they arrived in New South Wales in 1788 in the absence of any assignment from the agents of the transportation contractor, William Richards Jnr., were there other devices at work by which transported convicts were transformed into prisoners in servitude? We need to examine the three devices that might have made this possible. These devices were: the use by London of legislative or executive powers (or both) to frame the laws in the colony, the operation of the received law in New South Wales through the legal theory known as the doctrine of reception, or the more general assumption that New South Wales was a penal colony and therefore the niceties of English legal jurisprudence would give way in the fact of a clearly intended purpose that the colony was to be a receptacle for transported convicts. The point of inquiring into these three devices is to ascertain whether it would have been possible, in 1788, to determine the status of the newly-arrived convicts, if at all. These are considered in turn.

It was evident from the plans to establish the settlement at Botany Bay in 1787 that the British government clearly understood the limitations of the authority of British institutions outside England. While Britain could attempt to legislate for New South Wales in 1787, it attempted to do so only in the most restricted terms related to the establishment of the criminal and civil courts.<sup>11</sup> This limited use of legislative powers in the foundation of New South Wales gave rise to a sustained

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<sup>10</sup> See the discussion in Chapter 6.

<sup>11</sup> Atkinson attributed these moves to the concerns of Lord Sydney that Englishmen abroad should have the liberties of Englishmen in England. Alan Atkinson, *The Europeans in Australia: A History* (Oxford, 1997), pp. 65, 89-91, and 209.

criticism from Jeremy Bentham that without either authority to establish the colony from parliament or any local legislature in New South Wales, local regulations issued by the governor would be invalid.<sup>12</sup> In his examination of the establishment of New South Wales, High Court of Australia justice Sir Victor Windeyer concluded that within the new colony the governor wielded both executive and legislative authority; his authority was that of an autocrat.<sup>13</sup> The principal connection between London and New South Wales by which the colony was to be administered was through instructions to be issued by the King or order of the Privy Council to the governor of New South Wales.<sup>14</sup> In effect then, the governor made laws in New South Wales, but was subject to controls from London. The commissions of successive governors of New South Wales reiterated this arrangement until 1825.

The British government's initial plans for Botany Bay and the role of the convicts were contained in Instructions issued to Phillip by George III in London on 25 April 1787. This was an exercise of prerogative power. The Instructions made two relevant mentions of the role of the convicts.<sup>15</sup> First, Phillip was informed:

And whereas we have ordered that 600 male and 180 female convicts now under sentence or order of transportation whose names are contained in the list hereunto annexed should be removed out of the gaols of our kingdom, and be put on board of the several transport ships which have been taken up for their reception ...that you do take them under your protection;<sup>16</sup>

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<sup>12</sup> Bentham, 'A Plea for the Constitution', pp. 261-5.

<sup>13</sup> Sir Victor Windeyer, 'A Birthright and an Inheritance', *Tasmania University Law Review*, 1(1958), pp. 634-699, at p. 646.

<sup>14</sup> 1 *Historical Records of Australia* (hereinafter *HRA*) 1, p. 3.

<sup>15</sup> The text of the Instructions is set out in 1 *HRA* 1, pp. 9-16. The Instructions followed two commissions; the first dated 12 October 1786 (1 *HRA* 1, pp. 1-2) and the second dated 2 April 1787 (1 *HRA* 1, pp. 2-8).

<sup>16</sup> 1 *HRA* 1, pp. 9-10.

No reference was made to Phillip being the convicts' gaoler. They did, however, address the need for the convicts' services to be assigned to him in the following terms:

You will, however, take care, before the said transport ships are discharged, to obtain an assignment to you or the Governor-in-Chief for the time being, from the masters of them, of the servitude of the several convicts for the remainder of the times or terms specified in their several sentences or orders of transportation.<sup>17</sup>

As examined in Chapter 4, the assignment documents were not forthcoming in 1788, or subsequently. Phillip's Instructions never mentioned the statutory formula; a 'property in the service of the offender'. Instead, the formula had been transformed into 'servitude', which was used for the first time in official correspondence. There is no record from the files of the time of any discussion on this matter in London before the Fleet departed.

The second instruction from London followed the first. Once the Fleet had arrived in Botany Bay, Phillip was instructed to:

proceed to the cultivation of the land, distributing the convicts for that purpose in such manner, and under such inspectors or overseers, and under such regulation as may appear to you to be necessary and best calculated for procuring supplies of grain and ground provisions.<sup>18</sup>

The reference to 'regulations' was Phillip's only guide as to his legislative role. So, as framed by George III and his ministers, Botany Bay was, in essence, to be an agrarian settlement tended by the convicts under Phillip's supervision.<sup>19</sup> What Phillip seemed to understand his Instructions to mean in practice was spelled out

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<sup>17</sup> 1 *HRA* 1, p. 11.

<sup>18</sup> 1 *HRA* 1, p. 11.

<sup>19</sup> Atkinson points out that there were no inspectors or overseers. Alan Atkinson, *The Europeans in Australia*: p. 70. Phillip's suitability for such a task is considered below.

just over one year later, when he wrote his first despatch to Lord Sydney on 15 May 1788. Phillip reported (emphasis added):

The labour of the convicts shall be, *as is directed*, for the public stock, but it is necessary to permit part of the convicts to work for the officers who, in our present situation, would otherwise find it impossible to clear a sufficient quantity of ground to raise what is absolutely necessary to support the little stock they have; and I am to request that your Lordship will be pleased to direct me to what extent that indulgence may be granted the officers of the garrison.<sup>20</sup>

Phillip's approach was endorsed by Secretary of State Grenville in June 1789 in a letter notifying the despatch of the female convicts on the *Lady Juliana*.<sup>21</sup>

Grenville directed Phillip to 'cause them to be employed in such manner as may be most conducive to the advantage of the settlement.' In August 1789, Grenville sent Phillip further Instructions, this time on the matter of land grants. As part of the detail, Phillip was instructed to assign the services of convicts to people in the colony taking up land. The number of convicts assigned was left to Phillip's discretion; the only condition being that convicts should be supported by the settler, again in terms considered appropriate by Phillip.<sup>22</sup> The subsequent growth of the provision of the labour of the convicts to officers and settlers was to be a later development in New South Wales and not contemplated at the outset.

So, if Phillip's Instructions contemplated an agrarian settlement at Botany Bay in which the convicts, in servitude to Phillip, were to cultivate the land under supervision to produce what Phillip described as 'public stock', was this a sufficient device to place the convicts into servitude? Such a conclusion would

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<sup>20</sup> 1 HRA 1, pp. 22-3.

<sup>21</sup> Grenville to Phillip; 19 June 1789: 1 HRA 1, pp. 120-1, at p. 120. The reference, 'productions of all descriptions acquired by the labour of the convicts', nevertheless remained in Instructions to subsequent governors until 1825.

<sup>22</sup> Grenville to Phillip; 22 August 1789: 1 HRA 1, pp. 124-8, at p. 126. Atkinson argued that Phillip was shaping the nature of convict services into his own views. Alan Atkinson, *The Europeans in Australia*: pp. 76, 77.

seem to be insufficient and to take effect only on inference. Turning then to the next available device, did the general laws operating in New South Wales offer any clearer guide to the status of the convicts of the First Fleet?

Contemporaries understood that, in 1788, New South Wales was not part of England. Ignoring the presence of the indigenous population, New South Wales was seen as *terra nullius*, that is, a land belonging to no one. The prevailing English law doctrine, in such circumstances, was that the arriving Englishmen, that is, Phillip and his mixed party of officials, soldiers, and convicts, ‘carry with them so much of the English law as is applicable to their new situation and the conditions of an infant colony.’<sup>23</sup> This was the view of both HV Evatt and Sir Victor Windeyer.<sup>24</sup>

The issue of what laws from England were received in New South Wales by operation of Blackstone’s doctrine has been considered in the literature. Framed initially by Evatt in 1938 and Windeyer in 1958, the most detailed treatment is that by David Neal in *The Rule of Law in a Penal Colony*.<sup>25</sup> Neal’s close examination of early criminal and civil trials at Sydney Cove in 1788 demonstrated the reception, not only of English common law with respect to crime and punishment, but of English common law with respect to civil liability as well. This resulted in the *Cable v. Sinclair* case, in which two convicts were able to recover damages from the master of the *Alexander* transport for the loss of

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<sup>23</sup> William Blackstone, *Commentaries on the Laws of England*, Volume 1, (London, 1765), p. 107. Blackstone had expounded his doctrine some twenty years before the foundation of New South Wales.

<sup>24</sup> Herbert Vere Evatt, "The Legal Foundations of New South Wales", *Australian Law Journal*, (1938), p. 409-38, at p. 411. Windeyer, "A Birthright and an Inheritance", p. 634.

<sup>25</sup> David J Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, 1991). Windeyer and Neal cover much the same ground, although Windeyer’s 1958 contribution to this debate was a single speech, whereas Neal’s arguments originated in a PhD thesis.

their baggage.<sup>26</sup> So, while Neal demonstrated the doctrine of reception and that some laws of England arrived with the First Fleet, the doctrine of reception was an imprecise tool to determine which laws were applicable to their new situation and neither Evatt, Windeyer, nor Neal seems to have framed these 1788 occurrences as the beginnings of a *sui generis* common law in the colony.<sup>27</sup>

While the application of the doctrine of reception, and the experiences of the authorities and the convicts in the colony in 1788, demonstrated the reception of some laws from England and the wider understanding of ‘the rule of law’; it needs to be recognised that the laws of England in 1788 said nothing about the status of convicts transported from England to New South Wales. The transportation legislation in 1788 comprised the two statutes 24 Geo III c. 56 (applying to England) and 25 Geo III c. 46 (applying to Scotland). Both contemplated the transportation of convicts to places designated by the King in council. But neither, like 4 Geo I c. 11 in 1717, made mention of the status of a transported convicts once they had landed at their destination. The two statutes of 1784 and 1785, unlike that of 1717, made no attempt to operate extraterritorially. Once a convict departed England and the reach of the English legal and judicial institutions, the only connection between the convict and the laws of England and, therefore, their punishment, depended upon the laws and institutions established in New South

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<sup>26</sup> Neal, *The Rule of Law in a Penal Colony*, pp. 1-8.

<sup>27</sup> The issue of applicable laws gave rise to its own bibliography, not just in New South Wales but in the British colonies generally. Charles Clark’s *A Summary of Colonial Law, the Practice of the Courts of Appeals from the Plantations, and of the Laws and Their Administration in All the Colonies* (London, 1834) attempted to cover the field for use by the legal profession some fifty years later. A more contemporary view is contained Jeremy Stoljar, “Invisible Cargo: The Introduction of English Law into Australia”, in Gleeson, J.T., Watson, J.A., and Higgins, R.A.C., eds., *Historical foundations of Australian law, volume 1*, (Sydney, 2013), pp. 194-211.



Wales. In England, specific legislation covered the creation and operation of penitentiaries.<sup>28</sup> This legislation too, had no extraterritorial effect.

It can be concluded therefore that, while the doctrine of reception introduced so much of the law of England as was applicable to the colony and, in a wider sense, the operation of the rule of law, the received law did not address specifically, or generally, the status of the convicts of the First Fleet. Stated simply, no law of England placed a transported convict into servitude. However, one measure which did arrive in New South Wales because of the doctrine of reception was the civil rights of an English shipping contractor. By virtue of his statutory proprietary right to the services of the transported convicts, William Richards Jnr. was in a position to assign his rights to any one he chose in New South Wales, including the colonial governor. But, as has been demonstrated, this did not happen.

Turning now to the third device which may have framed the status of convicts, was it possible that the characterisation of New South Wales as a penal colony may have *ipso facto* determined the status of the First Fleet convicts? The view that New South Wales was a penal colony is ubiquitous. Successive committees of the House of Commons in 1812, 1837-8, 1856, and 1861 consistently referred to New South Wales as a 'penal colony', while accepting that a growing proportion of the colonial population were free British subjects.<sup>29</sup> Evatt went so

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<sup>28</sup> The 'Penitentiary Act', 19 Geo III c. 74, only applied to England and Wales. Its operation was extended to 1 June 1787 by 24 Geo III c. 56 in 1784 and to 1 June 1793 by 28 Geo III c. 24 in 1788.

<sup>29</sup> 1812; House of Commons Parliamentary Papers, *Report from the select Committee on Transportation*, Paper No. 341. 1837; *Report of the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*, Paper No. 518. 1837-38; *Report of the Select Committee on Transportation, together with the minutes of evidence, appendix, and index*, Paper No. 669. 1856; *First Report from the Select Committee on Transportation; together with the minutes of evidence and appendix*, Paper No. 244. 1861: *Report from the Select Committee on*

far as to consider New South Wales as an extended penitentiary and the governor its 'Superintendent-General or Head Gaoler'.<sup>30</sup> There would appear to be little doubt that later Australian historians saw New South Wales in much the same way.<sup>31</sup>

The relevance of this approach to the nature of the colony from its inception is that an English sentence or order of transportation and the actual arrival of a convict in New South Wales constituted sufficient processing to place a transported convict into servitude. Thus, the convicts were in an antipodean gaol serving sentences imposed from England; the niceties of proper legal forms and procedures have less significance and errors or omissions in process can be ignored in the overall scheme. This idea about New South Wales has obvious limitations. Even the House of Commons Select Committees understood that New South Wales was home, not just for convicts, but for free settlers and their children, as well as for ex-convicts and their descendants. In 1803 Jeremy Bentham went so far as to categorise the resident population into ten separate classes, only one of which was convicts.<sup>32</sup> In a sense then, the descriptor 'penal colony' was devoid of meaning when used by contemporaries and referred only to that part of the colony which managed transported convicts, not to the colony as a whole.

But if New South Wales was not a penal colony, and was, essentially a free society, albeit as Hirst noted, a free society, although a 'colony of convicts', then

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*Transportation; together with the proceedings of the committee, minutes of evidence, appendix, and index*, Paper No. 286.

<sup>30</sup> Evatt, "The Legal Foundations of New South Wales", pp. 423, 421.

<sup>31</sup> AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London, 1966), pp. 51, 62. Neal, *The Rule of Law in a Penal Colony*, pp. 23, 32.

<sup>32</sup> Bentham, 'A Plea for the Constitution', p. 256.

the consequences for the status of convicts can be considered differently.<sup>33</sup> The reception of convicts beyond the jurisdiction of English institutions meant that proper processes were needed to govern all societal relationships, not just the management of convicts. The conclusion then is that the designation of New South Wales by contemporaries as a penal colony carried with it no overarching mechanisms which defined the status of the transported convicts.

So, is it possible to determine the nature of the new colony of New South Wales from discussions in England prior to its foundation? The evidence here, while mixed, leads to a clear conclusion. The first formulation of a colony in New South Wales had been submitted to the British government by James Matra in August 1783 for the settlement of American loyalists. Matra had specifically disapproved of the settlement as a place for the reception of convicts.<sup>34</sup> Lord Sydney, however, viewed the plan differently. He advised Matra that he thought that 'New South Wales a very proper region for the reception of criminals condemned to transportation.' Matra reconciled his approach with that of the Secretary of State and, citing the resolutions of the Beauchamp Committee, concluded that the presence of criminals would amount to the unity of 'good policy and humanity'.<sup>35</sup> Despite Sydney's observations, no immediate plans were put in place to colonise New South Wales.

In January 1785, Attorney General Richard Pepper Arden forwarded to Lord Sydney the views of Admiral Sir George Young for a settlement in New South Wales which would 'be the most likely method of effectually disposing of

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<sup>33</sup> John Hirst, *Australian History in 7 Questions*, (Collingwood, 2014), p. 27.

<sup>34</sup> *Historical Records of New South Wales* (hereinafter *HRNSW*), Volume 1, Part 2, pp. 6-7. See also Matra's letter to Nepean of October/November 1784. *Ibid.* p. 8.

<sup>35</sup> *Ibid.* p. 6.

convicts, the number of which requires the immediate interference of Government.<sup>36</sup> Both Young and Arden, however, saw any settlement, not just as a place in which to dispose of convicts, but as a commercial centre which would include American Loyalists, as well as settlers from China and the Pacific region. Arden envisaged an initial party of some fifty convicts to be followed by bi-annual cargoes of around seventy convicts to supplement the availability of labour.<sup>37</sup> Clearly then, these early ideas about a future colony in which the services of convicts could be utilised by settlers would, of necessity, have required some measure of control over the convicts' labour, which would be passed, presumably through assignment, to the settlers.<sup>38</sup>

These issues remained unresolved until the report from the *Nautilus* expedition in August 1786 described the unsuitability of Das Voltas as a settlement for the American loyalists. This, in turn, led immediately to the decision of the Pitt cabinet, on much narrower grounds, to designate New South Wales as a destination to which to send convicts under sentence or order of transportation. This narrower scope was reflected in Lord Sydney's instructions to the Admiralty of August 1786 for the transportation of 750 convicts to Botany Bay, but did not contemplate any immediate steps for a civil settlement. Sydney's further instructions to the Admiralty of 31 August 1787 stated the intention 'that the convicts should form a settlement'.<sup>39</sup> The Heads of a Plan, prepared by Under-Secretary Nepean at the Home Department, and sent by Sydney to the Admiralty,

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<sup>36</sup> Ibid. p. 10.

<sup>37</sup> Ibid. p. 13.

<sup>38</sup> See Chapter 4. It is also useful to note that the numbers of convicts in contemplation in these early discussions would never have reached the 400 odd transportations necessary to meet the forecasts of John Howard in 1776.

<sup>39</sup> *HRNSW*, Volume 1, Part 2, p. 20. Atkinson argued that the initial plan was for a once-off settlement, not to be replenished while other possibilities continued to be examined. Alan Atkinson, *The Europeans in Australia*: p. 59.

focussed only on the convict aspect of the new settlement to the total exclusion of a civil society:

HEADS of a plan for effectually disposing of convicts, and rendering their transportation reciprocally beneficial both to themselves and to the State, by the establishment of a colony in New South Wales, a country which, by the fertility and salubrity of the climate, connected with the remoteness of its situation (from whence it is hardly possible for persons to return without permission), seems peculiarly adapted to answer the views of Government with respect to the providing a remedy for the evils likely to result from the late alarming and numerous increase of felons in this country, and more particularly in the metropolis.<sup>40</sup>

This narrow purpose for the colonisation of New South Wales was further reflected in George III's address to parliament on 23 January 1787 to the effect that:

A plan has been formed, by my Direction, for transporting a Number of Convicts, in order to remove the Inconvenience which arose from the Crowded State of the Gaols in different Parts of the Kingdom; and you will, I doubt not, take such farther Measures as may be necessary for this Purpose.<sup>41</sup>

Despite the King's statement to parliament, some shift in intention was discernible during February 1787. Phillip's 'views on the conduct of the expedition and the treatment of the convicts' included the following:

As I would not wish convicts to lay the foundations of an empire, I think they should ever remain separated from the garrison, and other settlers that may come from Europe, and not be allowed to mix with them, even after the 7 or 14 years for which they are transported may be expired.<sup>42</sup>

This evidence suggests then that the original intention was to found a civil settlement in which a small supply of convict labour would be available. In August 1786 planning for a penal colony was initiated by Lord Sydney, only to

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<sup>40</sup> *HRNSW*, Volume 1, Part 2, p. 17.

<sup>41</sup> *Journal of the House of Lords* (hereinafter *JHL*), Volume 37, (1783-1787), pp. 578-9.

<sup>42</sup> The provenance of these views is not exactly clear. They appear to be a letter from Phillip to Lord Sydney, 28 February 1787, *HRNSW*, Volume 1, Part 2, p. 53.

revert in early 1787 to the idea of a composite establishment. The colony was to be organised on a civil basis and would be available for future free settlement, but the initial population would, in the main, be convicts. Alan Atkinson rationalised the apparent contradiction by looking, not at processes within New South Wales itself, but to the evolving power of the government in London over all of its colonial empire. He described this evolution as the configuration of pre-emptive rights of government (imperial Britain) over the rights of the British subject: what he described as the arrival of the ‘imperial state’.<sup>43</sup> Viewed this way New South Wales became an imperial prison.

That New South Wales did become a form of imperial prison is not contested in this thesis. What is contested, however, is whether New South Wales can be described as an imperial prison in the early years of settlement. If the colony was not an imperial prison, did it become one at some time later and, if so, when and by what process? Importantly, if it did later, how was the early period of settlement to be characterised? It will be argued in Chapter 8 that as the processes of transportation were refined over time, and as the transportation numbers increased during the period 1815-1825, so the degrees of control exerted by London over the management of the convicts in the Colony intensified.

The only author to consider the status of convicts arriving in New South Wales was Bert Rice. In 1984 Rice argued essentially the same point being considered in this thesis; what was the status of convicts, or in Rice’s words; ‘were convicts sent prisoners?’<sup>44</sup> Rice relied on statements from Jeremy Bentham and Francis Forbes,

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<sup>43</sup> Atkinson, “The Free-Born Englishman Transported”, p. 111-2.

<sup>44</sup> Bert Rice, “Were the First Fleet Convicts Bond or Free?” *Journal of the Royal Historical Society of Victoria*, 55 (1984), pp. 44-47, p. 44.

although he may have been overly reliant on Bentham.<sup>45</sup> But, from Bentham, Rice understood that, in the absence of custodial warrants, it was necessary for the governors of New South Wales to obtain an assignment of property in the service of the convicts in order for the governor to detain a convict in New South Wales. Where this failed, channelling Bentham and Forbes, Rice concluded that a convict would be a freeman. Where an assignment did occur then, Rice concluded, a convict would be an indentured servant.<sup>46</sup> In reaching this conclusion, Rice relied on the American concept of indentured servitude; that is, where the status of a servant was acquired, whether or not there were signed indentures. In the context of this thesis, what Rice was describing, although he never used the words, was status.

Bert Rice's conclusions mostly coincide with the argument developed in this thesis, except for his conclusion that convicts were transformed into indentured servants. Limited English jurisdiction required reliance on a private law remedy. Instead of utilising custodial warrants (these were used within England, not outside it, but tried in Ireland until 1800), property in the service of transported offenders was utilised instead as a device intended to give colonial governors the power of masters, as in the relationship of masters and servants. By using Bentham, Rice's arguments contemplated both the circumstances of the failure to deliver the relevant documentation for the convicts in the First Fleet and those of 1802 and convicts on board *HMS Calcutta*, which sailed without the authority of the 1802 statute 42 Geo III c. 15. Following Bentham, Rice thought that

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<sup>45</sup> Rice cites Bentham as published in 4 *HRA* 1, Appendix B. This material comprised extracts from Bentham's, "A Plea for the Constitution". The extracts do not include the introduction which anchors Bentham's observations in the 1802 circumstances of the use of king's ships to transport convicts to New South Wales without proper authority.

<sup>46</sup> Rice, "Were the First Fleet Convicts Bond or Free?", p. 47.

transportation to Australia was always illegal because of non-compliance with Habeas Corpus. Bentham and Rice seem to be in error on this point.<sup>47</sup>

So, if New South Wales was to be a civil society from the outset, and not a penal colony, then some form of legal framework had to be necessary within the colony whereby the transported convicts were to be kept in the intended state of servitude. As mentioned above, one of instructions to Governor Phillip made the connection through the assignment of the convicts and their servitude. This requirement became essential when it was finally accepted in London before the departure of the First Fleet that New South Wales was going to be more than just a penal colony. However, if the processes by which this occurred was not accomplished by legislative or prerogative instruments issued from England, or from the overall nature of the colony, there remains one possible explanation for the circumstances of the convicts of the First Fleet; this lies in the reception of the laws of England with respect to master and servant which, in 1788, were still framed much in the provisions of the 1562 Statute of Artificers, the statute 5 Eliz 1, c.4. When faced with the fact that the masters of the convict transports had brought no documentation, Phillip had available an earlier experience from his own past as a country squire in Hampshire. Phillip cast his letter to London in May 1788 in terms of the need to be accurately informed about the sentences of the convicts.<sup>48</sup> But, using the prism of the status of the convicts, another interpretation becomes entirely plausible.

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<sup>47</sup> Rice concluded his short article in the *Journal of the Royal Historical Society of Victoria* with a note that his research materials are held in the RHSV Library. Inquiries with that library in August 2014 were unable to locate Rice's research materials which might have spread more light on his arguments.

<sup>48</sup> Phillip to Nepean, 9 July 1788, 1 *HRA* 1, p. 57.



On 19 July 1763, a twenty-four year old Royal Navy lieutenant Arthur Phillip, then on half-pay from the navy, married the forty-three year old Charlott Tybott, the widow of John Denison. Mrs Denison had been careful to place her £120,000 fortune into a trust for her benefit. The use of a trust avoided her fortune passing directly into the hands of her husband upon the wedding. Two years later, in 1765, the trust purchased a twenty-two acre farm at Lyndhurst in Hampshire, which was subsequently increased under Phillip's supervision. The marriage was not a success and the role of gentleman-farmer ended with a deed of separation on 22 April 1769. In September of that year, Phillip travelled to France to re-enter the service of the British government.<sup>49</sup>

The role of gentleman-farmer in rural England between 1765 and 1769 gave Phillip an experience that no other early governor of New South Wales was to bring to the role. He would have engaged and supervised domestic and agricultural servants on the farm in accordance with the master and servant laws of the time.<sup>50</sup> Phillip would have understood the separate roles and responsibilities of the master and the servants, as well as the possibility of coercion where the law permitted. His servants would have had 'status' and, while entry into a contract of employment in England was still based upon open consent, Phillip would have been, or would have become aware, that, in some circumstances labourers could be forced into service by law.

In May 1788, Phillip would not necessarily have found himself in a situation without a remedy. Prior to his arrival in New South Wales, in addition to his

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<sup>49</sup> Michael Pembroke, *Arthur Phillip: Sailor Mercenary Governor Spy* (Richmond, Victoria, 2013), pp. 42-7.

<sup>50</sup> See Chapter 1.

formal role of captain-general and governor in chief, Phillip must have contemplated the circumstances of him presiding over an essentially rural community, albeit considerably greater in extent than the estate at Lyndhurst, but not entirely dissimilar. While Phillip's own records are vague on the point, he seems to have treated the general body of convicts reasonably well, more as servants in a common enterprise than as convicts to be punished. Alan Atkinson argued that Phillip ignored his instruction to pardon convicts worthy of reward and grant them land.<sup>51</sup> If viewed through the prism of servants rather than prisoners, Phillip's disregard of this instruction was understandable. If the body of convicts were seen by Phillip as a body of servants, a resource through which he was to manage his rural community, then allowing the better workers to depart before their time was up could, from Phillip's perspective, have weakened the overall integrity of his supply of servants. Better to retain them to improve the quality and work ethic of the others and then reward them with land grants when their sentences had expired.

So it is now possible to consider a conclusion to the first question being considered in this chapter; how was the status of the convicts of the First Fleet determined once they arrived in New South Wales? The evidence demonstrates that, in the absence of any legislative or prerogative framework within which to operate, and on the failure of the assignment to him of the property in the service of the convicts from the masters of the transport vessels, with no clear legal authority to make them prisoners, Governor Phillip would have regarded the convicts as his servants in accordance with the laws of master and servant. This

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<sup>51</sup> Atkinson, *The Europeans in Australia*, p. 76.

understanding was played out some months later when Phillip appointed Lieutenant Philip Gidley King to proceed to Norfolk Island as superintendent. In his instructions to King issued on 12 February 1788, Phillip defined the position thus: ‘The convicts being servants of the Crown till the time for which they are sentenced is expired, their labour is to be for the public’.<sup>52</sup> This characterisation of the convicts, not as prisoners, but as servants was to remain a feature of the convict administration of New South Wales for some time.

It is now possible to look to the second question to be considered here: how was the status of convicts who arrived in New South Wales after the *Lady Juliana* and before the enactment in 1824 of 5 Geo IV c. 84 determined?

From the correspondence between London and the colony, it becomes clear that the practice developed in the early day of settlement of making convicts available for both public works, as well as for the benefit of settlers. While Phillip regularly reported to London on his deployment of the convicts in the colony thereafter, and to comment adversely on the lack of industry on the part of the convicts and their self-interest, few records of how the convicts were deployed by him survive.<sup>53</sup> It was not until the arrival of John Hunter as governor in September 1795, that a clearer picture emerges, largely because Hunter seemed to be very keen to report his activities to London.

What emerges from Hunter’s reports is an extensive catalogue of Government and General Orders covering a range of subjects which, in their aggregate, constituted

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<sup>52</sup> Instructions for Philip Gidley King, 12 February 1788; 1 *HRA* 1, pp. 32-4, at p. 34.

<sup>53</sup> Phillip to Grenville; 17 July 1790: 1 *HRA* 1, pp. 193-200, at pp. 195, 196.

the laws of the colony.<sup>54</sup> The governor's law making authority was never specified as such, it was simply assumed, giving rise to Windeyer's assessment of the governors of New South Wales as autocrats and Bentham's criticisms in *Plea for a Constitution*.<sup>55</sup> John MacLaurin (Lord Dreghorn) described this lawmaking authority as 'regulations and orders.'<sup>56</sup> Much use was to be made of local law making capabilities in the 1820s. These are considered in Chapter 8. What also emerged from these local laws was a growing collection of rules and regulations that controlled not only the convicts, but social intercourse for the entire colony. By way of example, these included; the regulation of the sale of liquor, departures from the colony, the need for contracts to be in writing, the allocation of assigned servants to the military and settlers, and the regulation of contacts with the Aboriginal natives. But it is the approach to the management of convicts that is of interest here. In March 1792 Phillip regulated the food rations to be issued to convicts.<sup>57</sup> In August 1796, Governor Hunter reported to London that he was regulating the hours of the convicts, while permitting them some free time during which they could sell their labour to enable them to purchase 'little luxuries' for themselves.<sup>58</sup> A regular Government Order addressed the food allowances for

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<sup>54</sup> A collection of General Standing Orders were printed by the Government Press in Sydney in 1802 entitled *New South Wales General Standing Orders*. The collection is dominated by orders issued by Governor King between 28 September 1800 and 30 September 1802. Governor Hunter was equally prolific. On 12 November 1796 Hunter sent the duke of Portland the texts of ninety-five orders issued between September 1795 and November 1796 covering a range of topics: 1 HRA 1, pp. 674-702. On 1 May 1799 he sent the duke the texts of another forty Public and government orders issued between August 1798 and May 1799: 1 HRA 2, pp. 351-67.

<sup>55</sup> Windeyer, "A Birthright and an Inheritance", p. 646 and Bentham, "A Plea for the Constitution", pp. 261-6, 269-72.

<sup>56</sup> John MacLaurin, J. 'Of the Punishment of Transportation', Volume 2, *The Works of the Late John MacLaurin* (Edinburgh, 1798), pp. 58-72, at p. 59.

<sup>57</sup> Phillip to Nepean; 29 March 1792: 1 HRA 1, pp. 345-8.

<sup>58</sup> Hunter to Portland; 12 November 1796: 1 HRA 2, p. 593.

convicts, especially in times of scarcity. Allowances were also made for summer and winter work.<sup>59</sup>

The language used in the Government Orders issued by Hunter conveyed his understanding of the relationship he had with the convicts. In a Government and Public Order issued on 15 May 1798 criticising sawyers for tardiness, Hunter pointed out that their 'labour is the property of the Crown'.<sup>60</sup> In June 1801 Governor King sought to regulate the assignment of convicts more circumspectly in the following terms:

The Convicts being the Servants of the Crown during the term of their transportation, their labour is to be invariably appropriated to the public benefit, and reducing the heavy expences of the Colony. Convicts whose labour the Governor may assign the creditable inhabitants can employ them to advantage, either in cultivation or in necessary occupations, are to be of no expence whatever to the Public.<sup>61</sup>

In November 1800 Hunter demanded an immediate end to the practice of horse-whipping convicts. This was repeated in February 1802 with penalties being applied to settlers convicted of the offense.<sup>62</sup> In June 1802 Governor Hunter, in making general observations on the order of labour in the colony, demanded that masters should not be exorbitant in their labour demands on assigned convict servants.<sup>63</sup>

Even the issue of the Irish convicts was addressed in a Public and Government order in 1799. Now in possession of the indents for the convicts transported from

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<sup>59</sup> Hunter to Portland; 12 November 1796: 1 *HRA* 2, pp. 681-2, 682, and pp. 696-7. The American historian AL Beier argued that the later history of forced labour in England witnessed attempts to regulate and discipline the role of labour in society. This was most obvious is the control of work hours. A.L. Beier, "'A New Serfdom' : Labor Laws, Vagrancy Statutes, and Labor Discipline in England, 1350-1800", in A. L. Beier and P. Ocobock eds., *Cast Out: Vagrancy and Homelessness in Global and Historical Perspective* (Athens, Ohio, 2008), pp. 35-83 at pp. 50-3.

<sup>60</sup> 1 *HRA* 2, p. 214.

<sup>61</sup> *New South Wales General Standing Orders*, (Sydney, 1802), p. 48

<sup>62</sup> *New South Wales General Standing Orders*, (Sydney, 1802), pp. 26, 81.

<sup>63</sup> 6 February 1802: *New South Wales General Standing Orders*, (Sydney, 1802), p. 79.

Ireland prior to that time, Governor Hunter advised that details about individual sentences could be verified by inspection at the Commissary's Office in Sydney.

He added:

Such as may seem to have been sent here for life need not despair of being again masters of their own labors, as every man know that a decent, orderly, industrious, and obedient conduct has frequently in this colony recommended many to public favor.<sup>64</sup>

No concessions were made to these Irish convicts who had arrived in the colony without the laws of Ireland addressing the issue of property in their services.

Hunter, like Phillip before him, simply glossed over the possibility of process error. If a convict's name was listed in an indent, successive colonial governors, using local regulations, simply placed them into servitude in New South Wales.

As examined in Chapter 6, only Governor Macquarie appears to have raised issues about the status of individual convicts transported from Scotland.

Bentham had criticised the early governors because they were 'sea captains' and were too willing to accept their instructions as law.<sup>65</sup> Evatt, on the other hand, complimented 'the commonsense, courage and care' of the early governors in the face of the difficult circumstances in which they found themselves.<sup>66</sup> In effect, the governors carried out their instructions to maintain transported convicts in servitude as they understood it and with very little guidance from London in the face of poor attention to planning and detail in 1786 and 1787, and lack of response when shortcomings in the process were brought to their attention by Phillip, Hunter, and Macquarie in 1815.

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<sup>64</sup> Order of 10 May 1799. Copied by Hunter to Portland, 1 May 1799: 1 *HRA* 2, p. 366.

<sup>65</sup> Bentham, "A Plea for the Constitution", p. 256.

<sup>66</sup> Evatt, "The Legal Foundations of New South Wales", p. 422.

By way of conclusion to the questions asked at the outset, it has been demonstrated that, while the doctrine of reception made it clear that some aspects of English law arrived with the First Fleet in New South Wales in January 1788, English law was silent on the status of transported convicts. The 1717 statute 4 Geo I c. 11 operated in America. Its 1784 replacement, 24 Geo III c. 56, had no extra-territorial operation and, on its face therefore, did not operate outside England. The English legislation governing houses of correction, the hulks, and the (unbuilt) penitentiary had no extra-territorial effect. The only extra-territorial measure from 24 Geo III c. 56 was the civil proprietary right to property in the service of a transported convict enjoyed by the transportation contractor. This operated in New South Wales, not as an element of the (British) criminal justice system, but as a private proprietary right, capable of disposition by assignment. These were the elaborate processes devised in London over December 1786 and January 1787, but which failed to be discharged fully in Sydney before the departure of the First Fleet transport vessels. The assumption that convicts sent to New South Wales automatically entered into servitude upon arrival, has been demonstrated to be false. What actually happened was something more complex. Convicts delivered into New South Wales were treated 'as if' they were in servitude.<sup>67</sup> There were exceptions: five of the six Scottish Martyrs were exempt. Hunter recognised that Irish convicts were in a different position as well. But generally what happened in New South Wales was that 'local regulation' transcended the application of the actual rule of law from England, Ireland, and non-adjudged cases from Scotland. New South Wales colonial law recognised only the term of the sentence and the expiry date.

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<sup>67</sup> No reference was made to it, but this is virtually the same as the operative provisions of the 1662 statute, 14 Car II c. 12. See Chapter 2.

On receipt of the assignment from the transportation contractor, successive governors, using a variety of terms: ‘prisoners’, ‘convicts’, ‘servants’; defined the status of convicts as ‘servants of the crown’ or people whose ‘labour was the property of the crown’. Developing Phillip’s understanding of his Instructions that the product of the labour of the convicts was to be ‘public stock’, later governors viewed the labour of the convicts as being primarily aimed at public works, but, from the beginning of the settlement, there was some leakage of public labour to private purposes. As the population of the colony increased and diversified, assigned servants were made available, as described by Governor King, to ‘creditable inhabitants’ as assigned servants, with at least part of the purpose being to take the expense off the hands of government. In effect then successive governors of New South Wales made laws in the colony with respect to the status of arriving convicts. By the 1830s the combined effect of these local laws enabled Chief Justice Francis Forbes to summarise what he described as the ‘whole law of transportation’. Property in the service of transported convicts remained a central feature of the governor’s powers, as did the restrictive colonial laws that controlled the behaviour of convicts, which had the capability of reducing opportunities for early remission.<sup>68</sup> As Forbes pointed out in 1837, without property in the service of transported convicts, a transported offender was a free man, albeit under an effective order of banishment. What the evidence shows then was that the governors of New South Wales created special laws for convicts. That is, they had created special laws for a class of persons, namely convicts. Just as colonial America had created laws for servants which they referred to as

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<sup>68</sup> Forbes’s letter to Commissioner Amos was set out in Appendix 12 in *Report of the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*, 1837, No. 518.



servitude, so too, in New South Wales, local law categorised arriving offenders as ‘convicts’, whether or not the actual processes to that end had been completed in the British Isles. In effect then local law in New South Wales had recreated status, although no one seems to have contemplated using that language.

## Chapter 8: Getting rid of the rubbish; the legislation of 1824

On 19 May 1824, Robert Peel, the Secretary of State for the Home Department, introduced a bill into the House of Commons for an *Act for the Transportation of Offenders from Great Britain*.<sup>1</sup> The bill received royal assent on 21 June 1824 as the act 5 Geo IV c. 84 and came into force on 24 June 1824.<sup>2</sup> As the title to the act stated, it was limited in its operation to Great Britain. While Ireland was mentioned in the text, nothing in the act altered the operations of the existing legislative scheme covering transportation from Ireland, which had been enacted prior to the Union of 1801. In effect, the transportation schemes examined in Chapter 5 with respect to Ireland remained in operation. This meant that, after 24 June 1824, parallel transportation schemes operated with respect to convicts transported from the British Isles to the Australian colonies.<sup>3</sup> As is demonstrated below, 5 Geo IV c. 84 had two significant impacts upon the concept of property in the service of transported offenders: one was to restate the formula ‘property in the service’ of transported offenders, the meaning of which forms the principal research question in this thesis. This restatement, despite the intentions of the government in London, was to have unexpected consequences in New South Wales and Van Diemen’s Land once the restatement was considered by the colonial authorities. The second significant impact was that 5 Geo IV c. 84 also continued a separate scheme of transportation introduced the year before in 1823. This permitted the transportation of male offenders from Britain without any

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<sup>1</sup> *Journals of the House of Commons* (hereinafter *JHC*), Volume 79, (1824-1825), p. 388.

<sup>2</sup> *Journals of the House of Lords* (hereinafter *JHL*), Volume 56, (1824-1825), p. 445. By virtue of the First Schedule to the Short Titles Act 1896, this act was called the Transportation Act, 1824. This name was rarely utilized by contemporaries. Chief Justice Francis Forbes, for example, always referred to the legislation as ‘the 5 George IV, cap. 84’.

<sup>3</sup> The only subsequent modification to the Irish transportation regime was an 1811 act of the Great British parliament, 51 Geo III c. 63, which related to offenders in Ireland awaiting transportation.

reference to the concept of property in the service of offenders. It will be demonstrated below that it was under this, parallel, and third, transportation scheme that convicts were transported to Bermuda, Western Australia, and Gibraltar.<sup>4</sup> After 1824 then, three separate systems of transportation were in simultaneous operation with respect to the transportation of offenders from the British Isles.

The evolution of 5 Geo IV c. 84 and its impact upon the status of transported convicts is considered through two questions: first, what brought about the new legislative regime in 1824; second, how did the new legislation deal with the issue of property in the service of transported convicts?

Before considering the first question, it is useful to note the continued evolution of the laws enabling transportation after 1784. The 1784 legislation authorising transportation from England, 24 Geo III c. 56, was due to expire on 1 June 1787, as was that authorising transportation from Scotland.<sup>5</sup> The legislation to perpetuate the transportation regime between 1785 and 1824 is summarised in the following Table.

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<sup>4</sup> The Act of 1823 which first contemplated transportation without property in the service of the offender was 4 Geo IV c. 47.

<sup>5</sup> See Sec. XIX of 24 Geo III c. 56 and Sec. X of 25 Geo III c. 46.

**Table 14: Summary of legislation perpetuating transportation between 1785 and 1824**

	Year & Regnal citation	Effect
1	1788: 28 Geo III c. 24	24 Geo III c. 56 (England) extended to 1 June 1793 per Sec. 3. 25 Geo III c. 46 (Scotland) not extended and, presumably, expired. Sec. 5 of this statute gave rise to the king authorising Thomas Shelton to enter into the transportation contracts mentioned in Chapters 5 and 6.
2	1794: 34 Geo III c. 60	24 Geo III c. 56 (England) and 25 Geo III c. 46 (Scotland) extended to 1 June 1799 per Sections I and II. <sup>6</sup>
3	1799: 39 Geo III c. 51	24 Geo III c. 56 (England) and 25 Geo III c. 46 (Scotland) extended to 25 March 1802 per Sections I and II.
4	1802: 42 Geo III c. 28	24 Geo III c. 56 (England) and 25 Geo III c. 46 (Scotland) extended to 25 March 1805 per Section II.
5	1802: 43: Geo III c. 15	King authorised to give property in the service of offenders transported in HM's ships. This was considered in Chapter 6,
6	1806: 46 Geo III c. 28	24 Geo III c. 56 (England) and 25 Geo III c. 46 (Scotland) extended to 25 March 1813 per Section I.
7	1813: 54 Geo III c. 39	24 Geo III c. 56 (England) and 25 Geo III c. 46 (Scotland) extended to 25 March 1814 per Section II.
8	1815: 55 Geo III c. 156	24 Geo III c. 56 (England) was repealed and, effectively re-enacted. 25 Geo III c. 46 (Scotland) and this statute was to continue in force until 1 May 1816 'and no longer' per Section XIX.
9	1816: 56 Geo III c. 27	55 Geo III c. 156 (England) and 25 Geo III c. 46 (Scotland) were to extend to 1 May 1821 'and no longer' per Section XXI.
10	1821: 1 & 2 Geo IV c. 6	55 Geo III c. 156 (England) and 25 Geo III c. 46 (Scotland) were to extend for two years (from 24 March 1821) and then until the end of the then next session of parliament. <sup>7</sup>

In all, some twenty-one separate items of legislation were enacted before the major revision to transportation law in the form of the 1824 statute 5 Geo IV c. 84. This legislative development can be summarised thematically into four broad areas. The first area comprised straightforward continuation legislation which extended the operation of 24 Geo III c. 56 and 25 Geo III c. 46.<sup>8</sup> These continuations were not always carried out efficiently or effectively. Legislation in

<sup>6</sup> The assumption to be drawn was that 25 Geo III c. 48 had been revived.

<sup>7</sup> Peel's second reading speech and the parliamentary schedule suggested this date would have been 25 June 1824.

<sup>8</sup> In this first stream are 28 Geo III c. 24 (1788); 34 Geo III c. 60 (1794); 39 Geo III c. 51 (1799); 42 Geo III c. 28 (1802); 46 Geo III c. 28 (1806); and 53 Geo III c. 39 (1813).

1793 extended the operation of the laws with respect to England, but not to Scotland. In 1815 the entire extension process with respect to transportation from England (but not Scotland) was terminated and prior statute of 1784 was repealed. They were replaced by a new, but essentially identical, transportation regime in 22 Geo III c. 156.<sup>9</sup>

The second area comprised compatible legislation regarding the temporary confinement of offenders in England and Scotland while awaiting transportation.<sup>10</sup> The third and fourth streams are more relevant here. The third area comprised two statutes, one of 1788 and the other of 1802, which authorised changes to the processes for transportation. That of 1788 was considered in Chapter 4 and provided the basis against which Thomas Shelton became a part of the transportation process. The other item of legislation in this third evolutionary stream contemplated the use of vessels of the Royal Navy in accordance with the plans of Lord Pelham to transport offenders to New South Wales, instead of commercial contractors, also considered in Chapter 4.<sup>11</sup>

Excluded from Table 12 are three statutes by which Westminster took direct legislative action to influence matters in the Australian colonies. The first of these was the 1790 statute 30 Geo III c. 47, which authorised the colonial governors to remit the sentences of transported convicts. Governor Phillip's Second Commission of 2 April 1787 had authorised him to remit sentences.<sup>12</sup> After the

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<sup>9</sup> This new statute was also extended by 56 Geo III c. 27 (1816) which had also extended the Scottish regime from 1785. These arrangements were extended again by 1 & 2 Geo IV c. 6 (1821). The Transportation Act of 1824 replaced these arrangements. These were the expiring statutes mentioned by Robert Peel in the House of Commons on 4 June 1824 (see footnote above).

<sup>10</sup> See 31 Geo III c. 46, 1791; 34 Geo III c. 84, 1794; 39 Geo III c. 52, 1799; and 54 Geo III c. 30, 1813. The long titles for these statutes are set out in Appendix 1.

<sup>11</sup> Vessels of the navy were used during the 1830s, but under a different transportation regime.

<sup>12</sup> 1 *HRA* 1, pp. 2-8.

First Fleet had sailed from Portsmouth, it was considered that this power may have been limited to remit sentences imposed in New South Wales. The statute 30 Geo III c. 47 confirmed the broader use of the power to sentences imposed in England; that is the power to remit the sentences for which the convicts had been transported to New South Wales in the first place. This power was subsequently criticised by the House of Commons Select Committee into Transportation in 1812, which considered that, when used together with tickets of leave, the governor's powers to remit sentences were too generous. Notwithstanding this criticism, the secretary of state at the time, Earl Bathurst, resisted any changes although the power was curtailed in later years.<sup>13</sup>

The issue of remissions reappeared in 1823 in a third statute not listed in Table 12. In 1823, the parliament enacted the statute 4 Geo IV c. 96: *An Act to provide, until the First Day of July One thousand eight hundred and twenty seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof; and for other Purposes relating thereto*. The primary purpose of the legislation was to deliver sweeping administrative changes in the Australian colonies following from the report of Commissioner J.T. Bigge. The circumstances of the Bigge report are considered below. The relevance of 4 Geo IV c. 96 here is that it further addressed the issue of pardons granted by the colonial governors and permitted forms of internal colonial transportation for convicts committing 'secondary' offences.<sup>14</sup> This legislation was introduced into

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<sup>13</sup> In 1832 the statute 2 & 3 Wm IV c. 62 limited the power of colonial governors to issue tickets of leave and conditional pardons.

<sup>14</sup> The second power led directly to the two colonies enacting their own 'Transportation' Acts: 11 Geo IV, No. 12 in New South Wales, and 8 Geo IV, no. 4 in Van Diemen's Land.

the House of Commons on 27 May 1823 by Robert Wilmot-Horton, the Under-Secretary of State to the War and Colonial Office under Earl Bathurst.<sup>15</sup> On the same day, Secretary of State Peel introduced five bills for the reform of the criminal law. Four of these measures are beyond the scope of this thesis, but the fifth created a new system of transportation.<sup>16</sup> This bill authorized the employment at labour in the colonies of male convicts under sentence of transportation. Whether the War and Colonial Office had any input to the bill is unclear, but the effect was to create a parallel process of transportation from Great Britain. The bill passed through the parliament and received royal assent on 4 July 1823 as the act *for authorizing the Employment at Labour, in the Colonies, of Male Convicts under Sentence of Transportation*, 4 Geo IV, c. 47. The life of this new legislative scheme was linked to the expiry of the statute 56 Geo III c. 27. The expiry of both acts is considered below.

It is now possible to turn to the first question to be considered in Chapter 7; what was it that brought about the new legislative regime in 1824?

The need to set short terms for statutory extensions to the transportation legislation demonstrated in Table 12, against the continuing use of transportations during the period, suggests some lack of conviction on the part of the British Government. Construction of the penitentiary at Millbank had commenced in 1812, but was not completed until 1821 and early occupancy levels were low.

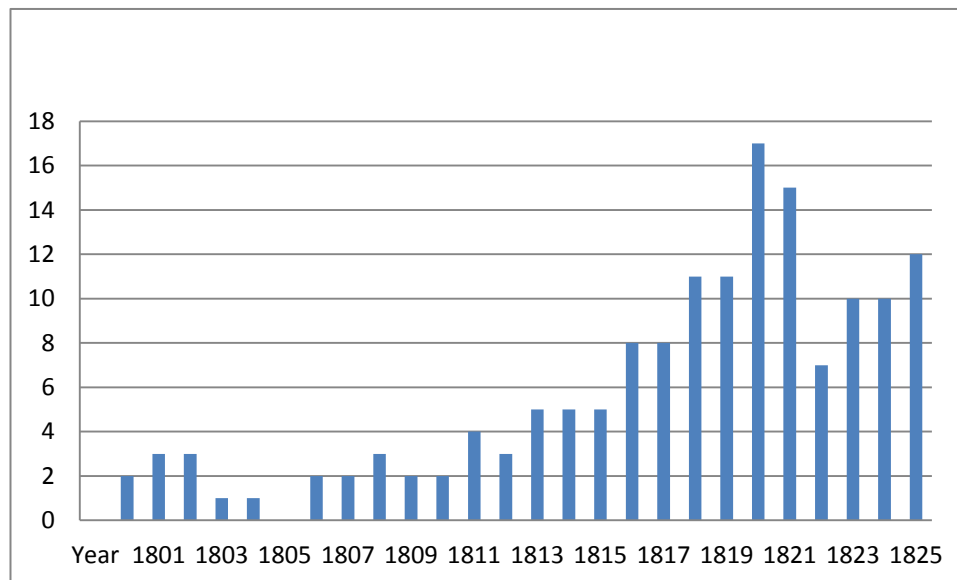
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<sup>15</sup> *JHC*, Volume 78, (1824-1825), pp. 346-7. A second bill introduced at the same time provided for the civil courts in Honduras. 4 Geo IV c. 96, the *Administration of Justice* legislation established the first senior court in New South Wales.

<sup>16</sup> Using the marginal notes from the *JHC*, Volume 78, (1824-1825), pp. 346-7, the other four bills were: the Felonies bill, the Larcenies bill, the Capital Punishment repeal bill, and the Sentence of Death bill.

Transportations from Great Britain (excluding Ireland) over this period are summarised in the following two figures:

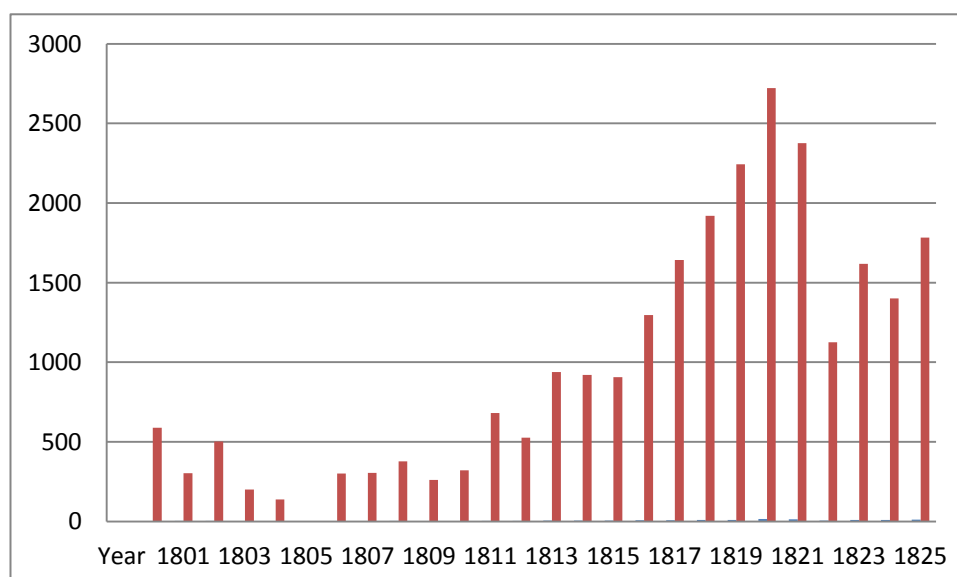
**Figure 4: Number of convict transport vessels departing Great Britain between 1800 and 1825**



Source: compiled from (Bateson 1969)

The numbers of convicts actually transported were:

**Figure 5: Number of convicts actually transported from Great Britain between 1800 and 1825**



Source: compiled from (Bateson 1969), using numbers of convicts embarked.



In a sense, the use of temporary legislation, apart from being reminiscent of the revival of temporary legislation authorising the banishment of vagabonds during the reigns of James I and Charles I, also suggests uncertainties in the management of the Home Department. During the period between July 1801 and 30 April 1827, eight different Secretaries of State held office. Two (Lord Pelham and Earl Spencer) were Whigs; the rest were Tories. Of the eight, four held office for less than one year, two for just over two years, and the remaining two; Viscount Sidmouth, and Robert Peel, both Tories, for ten and five years respectively.<sup>17</sup> The conservative Viscount Sidmouth paid little attention to reform.<sup>18</sup> It was left to his successor, Robert Peel, to start to bring about most of the significant reforms to the criminal law in England in 1823 and, in passing, changes to the legislative framework for transportation and the status of transported convicts. During this same period only three men held the post of permanent Under-Secretary at the Home Department and all were trained lawyers. John King succeeded Evan Nepean in December 1791 and remained in the position until February 1806. King helped initiate the introduction of property in the service of convicts transported from Ireland, which was considered in Chapter 5. King was succeeded by John Beckett in 1806 who remained in the position until June 1817. Beckett's role in the issue of the double sentencing of convicts from Scotland was considered in Chapter 6. In 1817 Beckett was replaced by Henry Hobhouse who remained in the

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<sup>17</sup> Lord Pelham (Whig) held office from 30 July 1801 to 17 August 1803. Charles Philip Yorke (Tory) held office from 17 August 1803 to 12 May 1804. Lord Hawkesbury (Tory) held office from 12 May 1804 to 5 February 1806. Earl Spencer (Whig) held office from 5 February 1806 to 25 March 1807. Lord Hawkesbury (Earl of Liverpool after 1808-Tory) held office again from 25 March 1807 to 1 November 1809. Richard Ryder (Tory) held office from 1 November 1808 to 12 June 1812. Viscount Sidmouth (Tory) held office from 11 June 1812 to 17 January 1822, and Robert Peel (Tory) held office from 17 January 1822 to 10 April 1827. Sourced from Fryde et al., *Handbook of British Chronology*, (London, 1986).

<sup>18</sup> See J. E. Cookson, 'Addington, Henry, first Viscount Sidmouth (1757–1844)', Oxford Dictionary of National Biography, Oxford University Press, 2004; online edn, May 2009 [<http://www.oxforddnb.com/view/article/150>, accessed 8 April 2015].

post until July 1827.<sup>19</sup> Hobhouse's role in the Home Department is considered below.

If the Home Department was not actively pursuing reform to the transportation laws, what can be said about the activities of the War and Colonies Office over the same period? Between 1801 and 1827 six men held the position of Secretary of State; only one, William Windham, was a Whig, the remainder were Tories.<sup>20</sup> Of the six, three held office for little over one year, or less; two for around two and a half years; and Earl Bathurst for nearly fifteen years.<sup>21</sup> During much of this period, Great Britain was in an active state of war against France and the role of the Secretary of State for War and the Colonies was channelled into supporting naval and military operations rather than actively managing the emerging empire, especially New South Wales and its convict population.<sup>22</sup> This is evident from the flow of despatches into and out of the War and Colonial Office. This was measured by DM Young in 1961 and demonstrated the relatively small amount of

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<sup>19</sup> J.C. Sainty, *Home Office Officials 1782-1870* (London, 1975), pp. 12-4. John King was called to the bar in 1790 and appointed law clerk at the Home Department in January 1791 and under secretary in December 1791. He remained at the Home Department until 1806. Stephen M. Lee, 'King, John (1759-1830)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 [<http://www.oxforddnb.com/view/article/64119>, accessed 13 May 2014] John Beckett was called to the bar in 1803 and practiced before joining the Home Department in 1806. See Beckett, John (1775-1847), of Somerby Park, Lincs. Published in *The History of Parliament: the House of Commons 1790-1820*, ed. R. Thorne, 1986. Henry Hobhouse was called to the bar in 1801 before becoming the solicitor to HM Customs from 1806 to 1812 and at the Treasury from 1806 to 1817 when he joined the Home Department and remained there until 1827. G. C. Boase, 'Hobhouse, Henry (1776-1854)', rev. G. H. Martin, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/13403>, accessed 7 April 2015]

<sup>20</sup> Lord Castlereagh held the position twice; between July 1805 and February 1806 and between March 1807 and November 1809.

<sup>21</sup> Lord Hobart held office from March 1801 to May 1804, Earl Camden from May 1804 to July 1805, William Windham from February 1806 to March 1807, the Earl of Liverpool from November 1809 to June 1812, and Earl Bathurst from June 1812 to April 1827.

<sup>22</sup> Neville Thompson, *Earl Bathurst and the British Empire 1762-1834* (Barnsley, Yorkshire, 1999) devoted six chapters to Bathurst's central role in the war against France and only one chapter on his experience with the colonies. A more general view of Bathurst's role is contained in Roger Knight, *Britain against Napoleon: The Organization of Victory 1793-1815* (London, 2014)

attention paid to convict affairs over this period.<sup>23</sup> Examining official correspondence for three different years; 1806, 1816, and 1824, Young showed that in 1806 only eighty-three despatches were received from New South Wales and fifteen were sent. Against the total received and despatched from all the colonies (1653 and 902 respectively) Despatches from New South Wales amounted to only 5% of the Department's incoming despatches and 1.6% of those outgoing. In 1816 the percentages for incoming despatches from Australia was 7.7% of the total received (347 out of 4487), while outgoing despatches rose to 11% of the total sent (349 out of 3161 despatched). By 1824 despatches received from Australian amounted to 12% (964 out of 7491), while despatches sent to Australia now took up 22% of the total (1104 out of a total of 4959).<sup>24</sup>

During this same period there were two inquiries into the management of transportation and convicts in New South Wales. The first, in 1812, was an inquiry into 'the manner in which sentences of transportation are executed, and into the effects which have been produced by that mode of punishment.' carried out by a select committee of the House of Commons.<sup>25</sup> The committee concluded that, while there were some issues surrounding the cost of maintaining the colony and the too liberal use of sentence remissions by the governor, the colony was, 'in their opinion, in a train entirely to answer the ends proposed at its establishment.'<sup>26</sup> While the Committee heard evidence from former governors

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<sup>23</sup> Young, *The Colonial Office in the Early Nineteenth Century* (London, 1961).

<sup>24</sup> Young, *The Colonial Office in the Early Nineteenth Century*. Extracted from Appendix VIII at pp. 282-4.

<sup>25</sup> 12 February 1812; *JHC* Volume 67, (1812), p. 111. George Eden (son of William Eden the reformer from the 1770s) chaired most of the witness sessions. Twenty-one members of the House were appointed to the Committee including Richard Ryder, the secretary of state for the Home Department, Henry Goulburn, his under secretary, and Robert Peel, the under secretary for the War and Colonies.

<sup>26</sup> *House of Commons Parliamentary Papers*, 1812, Paper No. 314, p. 14.

Hunter and Bligh, and received extracts from correspondence of Governor Macquarie, nothing was said directly about the status of transported convicts or the processes for the assignment of the convicts' services.

Earl Bathurst, initially, appeared to have accepted the contents of the report. He supported Macquarie by retaining the governor's wide power of pardon and was initially supportive of the committee's praise of the 'liberal' approach to managing the colony but, by 1817, he appears to have changed his views.<sup>27</sup> In 1819 he decided to appoint a commissioner to inquire into the state of New South Wales: the Bigge Inquiry. The instructions issued by Earl Bathurst to Commissioner John Thomas Bigge, Bigge's inquiry, and his reports of 1822 and 1823 are too detailed for close examination in this thesis, but the following overview provides some continuity. Bathurst was concerned that the settlement in New South Wales, indeed the punishment of transportation itself, was losing its deterrent effect. Instead, he wanted the punishment to be based upon strict discipline, exposure to constant work and vigilant supervision. The punishment of transportation was to be made an object of real terror, not just to the sentenced offenders, but also as a deterrent to the community in Great Britain as well.<sup>28</sup> Bathurst cautioned Bigge to avoid any 'ill considered compassion for the convicts', although he did admit to Bigge that the rapidly increasing numbers of convicts being transported to New South Wales might be exacerbating difficulties in the Colony.<sup>29</sup>

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<sup>27</sup> Bathurst to Secretary of State at the Home Department, Viscount Sidmouth, 23 April 1817. The text of the letter is set out in the appendix to the Bigge Report; House of Commons Parliamentary Paper, 1822, Appendix, pp. 5-7. It is also included in the notes at the end of 1 *HRA* 10, pp. 807-8.

<sup>28</sup> Instructions to Commissioner Bigge; 6 January 1819, 1 *HRA* 10, p. 7.

<sup>29</sup> This is confirmed by the details contained in Figures 4 and 5 above.

Bigge's commission was issued by the Prince Regent on 5 January 1819 and three sets of instructions, all dated 6 January 1819 were issued by Bathurst to Bigge.<sup>30</sup>

Bathurst notified Governor Macquarie about Bigge's appointment on 30 January 1819, sending copies of the commission and the texts of the three separate sets of instructions.<sup>31</sup> Bigge reported back to Earl Bathurst in May 1822 (tabled in the House of Commons in June 1822 and ordered to be printed).<sup>32</sup>

Bigge was highly critical of Macquarie's approach to the management of convicts and, taking a cue from one of Bathurst's instructions, for placing his confidence in expirees. While Bigge noted issues about the security of the indents, he only mentioned property in the services of convicts twice. The first was in an (unsuccessful) attempt to vest ownership of property in the service of the convicts into the hands of the surgeon superintendent, rather than the master of the convict transports.<sup>33</sup> Second, Bigge understood the role of property in the service of the offender in creating the state of servitude. He appeared to have had access to the opinion of the Law Officers of the Crown written in 1817 mentioned in Chapter 6.<sup>34</sup> However, despite his detailed examination of the procedures surrounding the receipt of male and female convicts in New South Wales and Van Diemen's Land, Bigge never mentioned the process of assignment of the convicts from the master

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<sup>30</sup> The commission and instructions are set out 1 *HRA* 10, pp. 3-11. When the instructions were printed in the House of Commons's papers in 1822, only one set of instructions were included.

<sup>31</sup> Bathurst to Macquarie, 30 January 1819; 1 *HRA* 10, pp. 2-3. Bathurst's despatch arrived in Sydney on 20 September 1819, less than one week before Commissioner Bigge.

<sup>32</sup> Copies of Bigge's Commission (dated 5 January 1818) and two sets of Instructions (dated 6 January 1819) are attached to Bathurst's despatch to Governor Macquarie dated 30 January 1819. See 1 *HRA* 10, pp. 2-11. Bigge's report to Earl Bathurst was dated 8 May 1822 and was ordered to be printed by the House of Commons on 19 June 1822. On 9 September 1822 Bathurst sent Governor Brisbane a copy of Bigge's report listing issues to be addressed by Brisbane. See 1 *HRA* 10, pp. 784-90. The First Bigge Report is set out in *New South Wales. Report of the commissioner of inquiry into the state of the colony of New South Wales*, 1822, No. 488. Hereinafter referred to as 'the Bigge Report.'

<sup>33</sup> Bigge Report, pp. 7-8.

<sup>34</sup> Bigge Report, p. 168.

to the governor, or past failures in that process. Why Bigge did not consider the assignment of the convicts to the governor is difficult to explain. Given his forensic reporting on almost every other aspect of the receipt of the convicts, it is possible that he did not think it important, although this would seem unlikely. Possibly he was not aware of the transaction occurring under his nose and did not understand its importance. It is not unreasonable to conclude that Bigge was not as close an observer of processes in New South Wales as he pretended to be.

Through the efforts of Bigge, Bathurst received the report that he wanted and this fell in line with how he perceived the proper administration of New South Wales ought to be. Bathurst sent a copy of the first Bigge report to Macquarie's replacement, Governor Sir Thomas Brisbane, on 9 September 1822 with detailed instructions as to how Brisbane would meet the 'Measures of Improvement' recommendation by Bigge.<sup>35</sup> Bathurst's detailed instructions to Governor Brisbane marked the beginning of the shift in administration of convicts in New South Wales. As explained in Chapter 7, early governors determined the legal rules about arriving convicts as best they could from the few directions provided from London. Bathurst's instructions saw the beginning of the process whereby the British Government and the Westminster parliament took over the direct rule of convicts in the Australian colonies and the management of their servitude.

There was no obvious response from the Home Department—now under the supervision of Robert Peel—to the report of Commissioner Bigge. Instead, the issue of transportation appeared as just one more element of the reforms to the criminal law being put in place under the auspices of Robert Peel and his Under-

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<sup>35</sup> 1 *HRA* 10, pp. 784-90.

Secretaries, Robert Dawson (Peel's brother-in-law) and Henry Hobhouse. As indicated above, on 27 May 1823 Peel had introduced five bills into the House of Commons, one of which resulted in the statute 4 Geo IV c. 47; *An Act for authorizing the Employment at Labour, in the Colonies, of Male Convicts under Sentence of Transportation*. This legislation opened up a parallel transportation process. This was administered by the Home Department, never used the concept of property in the service of the offender, and did not utilise the services of Thomas Shelton.<sup>36</sup> This statute, along with the, then, prevailing statute authorising transportation—56 Geo III c. 27—were due to expire together. The need for further extension legislation, or a new statute, must have been in mind when the parliamentary session which opened on 3 February 1824 got under way.

On 10 March 1824, Henry Hobhouse, the permanent Under-Secretary of State at the Home Department, wrote to the Lord Chief Justice, Charles Abbott. There is no evidence of similar contacts with the Law Officers of the Crown, nor with the War and Colonial Office. Hobhouse included the draft of a bill for transportation and sought the chief justice's comments, in order 'that it may be made more perfect before it is brought into the House.' Hobhouse set out a brief analysis of the existing transportation procedures, which corresponded exactly with the procedures summarised in Thomas Shelton's various accounts up to 1824:

beginning with a Contract for the Assignment of each Individual, the practice still is to make a Contract and Bond for each Jurisdiction to have a special Order in Council assigning the place of Transportation for every Individual by name and a formal

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<sup>36</sup> The origins of this legislation are difficult to pin point. The published papers of Robert Peel contain no detailed examination of the issue of transportation. Perhaps there was a desire within the Home Department for a speedier and more efficient method of transportation implemented by extending the use of the hulks in the Bermuda naval docks.

Assignment by the Captain of the Ship to the Governor when the cargo arrives at New South Wales.<sup>37</sup>

Hobhouse concluded his analysis stating, ‘It is desired to get rid of all this Rubbish and I have endeavoured by the enclosed Bill to do so.’

Whether Robert Peel had a direct hand in formulating the bill is unclear. The wording of Hobhouse’s letter to Chief Justice Abbott would suggest that Hobhouse, a qualified lawyer, had drafted the legislation himself. Peel’s second reading speech to the bill in the House of Commons on 4 June 1824 indicated a high degree of familiarity with the process of transportation that were to be put in train following the bill’s enactment, as well as with what was being replaced.<sup>38</sup> Peel had been elected to the House of Commons in 1809 at the age of twenty-one. On 10 June 1810, he had been appointed Under-Secretary of State for War and the Colonies under the earl of Liverpool. During the next two years he acted as a contact between the Home Department, the Colonial Office and Governor Macquarie in Sydney on money matters, the transportation of convicts, and sending salient news about the progress of the Peninsular War to Sydney. On at least three occasions during his term as under secretary, Peel transmitted to Sydney what he referred to as ‘indents’, but which were, in fact, the deeds of assignment of convicts being sent to New South Wales.<sup>39</sup> He was also aware that some processes were neither correct nor efficient, and required subsequent

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<sup>37</sup> Under Secretary Henry Hobhouse to Lord Chief Justice Charles Abbott, 10 March 1824, Home Office Letter Book, HO 43/32 June 1823 – February 1825, pp. 244-5, The National Archives.

<sup>38</sup> House of Commons *Hansard* for 4 June 1824. Second Series, Volume 11, columns 191-3.

<sup>39</sup> See Peel to Macquarie, 10 July 1810 for convicts on the transport *Indian*; 1 *HRA* 7, p. 340: Peel to Macquarie, 17 April 1811 for male convicts on the transport *Admiral Gambier* and female convicts on the transport *Friends*; 1 *HRA* 7, p. 354: and Liverpool to Macquarie, 19 May 1812 on various matters including the despatch of the transport *Indefatigable* to Hobart Town; 1 *HRA* 7, pp. 486-92. Becket to Peel, 12 May 1812, at pp. 490-2 together with the deed of assignment for the convicts on the transports *Indefatigable* and *Minstrel*. This deed of assignment is the only full text of an assignment deed contained in the *Historical Records of Australia*.



rectification.<sup>40</sup> Hobhouse's desire to get rid of 'all this Rubbish' may well have represented Peel's views, if not his own.

Under the bill introduced by Peel to the Commons on 19 May 1824 the processes of transportation were to be streamlined.<sup>41</sup> Peel paraphrased the words of Hobhouse to the chief justice as to 'the old procedures', pointing to the need to call meetings of the Privy Council for each shipment of transportation and to designate the destination. This was to be replaced by a general power of determination; in effect following the processes of 1603.<sup>42</sup> Peel also advised the Commons that the practice of each judicial jurisdiction entering into a transportation contract (the work that had largely been carried out by Thomas Shelton) was no longer required. A contract with the Naval Board alone would suffice. In a reference back to the Bigge Report, Peel pointed out that the punishment of transportation could apply unequally but that, in future, the Government of New South Wales would be empowered to send convicts 'of irregular habits' to 'distant settlements within the colony', the intent being 'to make transportation a much more severe mode of punishment than it had

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<sup>40</sup> See Peel to Macquarie, 31 July 1810 sending the omitted text of the indent (deed of assignment) for the convicts sent to New South Wales on the transport *Canada*; 1 *HRA* 7, p. 354. See also Liverpool to Macquarie, 30 June 1811 sending a letter from Beckett to Peel re the incorrect sentencing of a convict, Joseph Rodger, transported for life but which should have been seven years. Rodger had been on *HMS Glatton* and was, in 1811, eligible to return to Ireland; 1 *HRA* 7, p. 360.

<sup>41</sup> *JHC*, Volume 79, (1824-1826), p. 388. The bill was introduced by Peel and his under secretary (also his brother in law) Robert Dawson. Peel's remarks are taken from the House of Commons, *Hansard* for 4 June 1824, Second Series, Volume 11, columns 1091-2.

<sup>42</sup> This issue seemed to cause confusion. The power of determination remained with the king in council, but was to be carried out generally, not specifically as before. In fact the Privy Council met on 23 June 1824 and approved an order in council appointing New South Wales and Van Diemen's Land as destinations. Under Secretary Horace Twiss was to draw this conclusion in 1829 (see Twiss's paper to Secretary of State Sir George Murray, 1 December 1829 set out in 1 *HRA* 15, pp. 346-53. Chief Justice Francis Forbes reported to the Select Committee on Transportation in 1837 that this power had been passed to the secretary of state. It had not; the secretary of state had the responsibility of implementing the processes of transportation. See Forbes's evidence of 14 April 1837, para. 94, pp. 7-8.

generally been hitherto'. Robert Wilmot-Horton, from the Colonial Office used the same arguments to the Commons, but went on to point out that convicts 'of the worst class' might be sent to Norfolk Island, where the severity of punishment might be increased.<sup>43</sup> In fact, the legislation did no such thing. These arrangements were set in place by instructions issued by Earl Bathurst to Governor Brisbane as mentioned earlier and not by the legislation.

The structure of the act 5 Geo IV c. 84 followed much along the lines of the 1717 statute 4 Geo I c. 11. The binary nature of the punishment of transportation was restated in the context of sentences handed down by courts of competent jurisdiction within Great Britain (but not Ireland) or orders of transportation made with respect to capital convictions to whom pardons were offered on condition of transportation.<sup>44</sup> The Secretary of State was empowered to authorise the making of contracts for transportation.<sup>45</sup> This had the effect of shifting from the king to the Secretary of State the authorisation held by Thomas Shelton from 1788. Securities for performance were still required.<sup>46</sup> The difficulties faced by successive governors in New South Wales who lacked information about arriving convicts was addressed in Section IV setting out a fuller description of convicts to be provided by the sheriffs of transmitting gaols. This information gave rise to the form of later indents about convicts.<sup>47</sup> The possibility of a King's ship being used to transport convicts was recognised along similar lines to the legislation of 1802.

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<sup>43</sup> House of Commons *Hansard* for 4 June 1825, Second Series, Volume 11, column 1093.

<sup>44</sup> Section II.

<sup>45</sup> Section III.

<sup>46</sup> Section V.

<sup>47</sup> Francis Forbes explained to the 1837 Select Committee that by a provision in the 'local law', an arriving convict, answering to the name in such indent, and submission to be treated as the party therein named, is made *prima facie* proof of conviction and transportation and identity. Evidence of 14 April 1837. *Report of the Select Committee on Transportation*. House of Commons Paper 518. Para. 174, pp. 12-3.

For the purposes of this thesis, the central provision of 5 Geo IV c. 84 was the continued use of property in the services of transported offenders. However the means by which it was assigned was to be automatic upon arrival of the transport vessel. Reflecting the language used by Secretary of State William Granville to Governor Phillip in 1789 for the convicts of the *Lady Juliana*, Section VIII of 5 Geo IV c. 84 provided, ‘That so soon as any such Offender shall be delivered to the Governor of the Colony, ... the Property in the Service of such Offender shall be vested in the Governor of the Colony for the Time being.’<sup>48</sup> The effect was that, at a legislative stroke, the need for deeds of assignment properly delivered in Sydney or Hobart Town disappeared, as did the centrality of the transportation contractor in the processes of transportation. Property in the service of transported convicts was retained as an element of transportation, but this was transferred automatically upon delivery, without the possibility of process failure which had dogged governors since 1788. But in the recitation of the statutory transfer process, Henry Hobhouse created a problem for the colonies.

The capacity to assign property in the services of transported convicts had been an essential element of the contractor’s rights from 4 Geo I c. 11 from 1717. In all legislative restatements since then, the right to assign had only been stated implicitly. Hobhouse’s approach was to state the situation explicitly. This is demonstrated in the following table.

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<sup>48</sup> Section VIII.

**Table 15: comparison of 1717 and 1824 statements as to the assignment of property in the services of transported offenders**

4 Geo I c. 11: Sec. I	5 Geo IV c. 84: Sec. VIII
<p>and such Person or Persons so contracting, as aforesaid, his or their Assigns, by virtue of such Order of Transfer, as aforesaid, shall have a Property and interest in the Service of such Offenders for such Terms of Years</p>	<p>That so soon as any such Offender shall be delivered to the Governor of the Colony, or other Person or Persons to whom the Contractor, or such Nominee or Nominees as aforesaid shall be so directed to deliver him or her, the Property in the Service of such Offender shall be vested in the Governor of the Colony for the Time being, or in such other Person or Persons; and it shall be lawful for the Governor for the Time being, and for such other Person or Persons, whenever he or they shall think fit to assign any such Offender to any other Person for the then Residue of his or her Term of Transportation, and for such Assignee to assign over such Offender, and so as often as may be thought fit; and the Property in the Service of such Offender shall continue in the Governor for the Time being, or in such other Person or Persons as aforesaid, or his or their Assigns, during the Whole remaining Term of Life or Years for which such Offender was sentenced or ordered to be transported</p>

The 1717 formula simply contemplated the possibility of the transportation contractor assigning the services of a transported convict to a settler in America. As demonstrated in Chapter 3, however, the process of assignment occurred by way of sale in the American colonies and by the process of assignment to the governors of New South Wales provided the proper processes were utilised as demonstrated in Chapters 4, 5, and 6. The 1824 powers of the governor to assign to settlers went beyond anything that had previously been contemplated. While removing any role for the transportation contractor, the legislation, instead,

focussed on the rights acquired by the settlers in New South Wales and Van Diemen's Land to whom convicts were assigned. Indeed, it even suggested that the governor was required to assign all the convicts. At least this was the initial impression of the colonial governments in both of the Australian colonies.<sup>49</sup>

Before looking at the problems caused by Section VIII, it is pertinent to consider the remainder of the legislation 5 Geo IV c. 84. The new statute restated the essence of the hulks legislation in order to accommodate convicts in England awaiting transportation. The legislation allowed the appointment of superintendents and overseers and, in a peculiar throwback to the legislation of 1784, put forward by the short lived 24 Geo III c. 12, a subsistence allowance of £3 could be paid to an offender discharged from the hulk for good behaviour or expiry of sentence.<sup>50</sup>

Section XIII re-enacted the 1823 legislation 4 Geo IV c. 47 mentioned earlier and, in so doing, perpetuated an alternative form of transportation from Great Britain, but one free of any issue of property in the service of the offender. In essence the King in council was authorised to deploy any offenders under sentence or order of transportation to be employed in any part of the King's dominions under the management of a superintendent and overseers. Pursuant to this authority, an order in council was issued on 11 November 1825 designating Bermuda as the place to which offenders could be sent under this arrangement.<sup>51</sup> Subsequent

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<sup>49</sup> This was the view of Francis Forbes in 1827 considered below.

<sup>50</sup> Sections X, XI, and XII.

<sup>51</sup> The order in council was superseded by another of 22 May 1840. See House of Commons Parliamentary Papers, 1840, paper No. 352.

orders in council nominated Gibraltar in 1842 and Western Australia in May 1849.<sup>52</sup>

The statute provided the following additional measures. While court jurisdictions ceased to be relevant in the transportation contracting process, Section XX nevertheless allowed sheriffs and gaolers, instead of the transportation contractor, to take offenders across county boundaries en route to a sea port for transportation. Special mention was made of the circumstances of offenders under order of transportation being brought into England in order to be shipped to Australia. This, incidentally, was the only occasion in the legislation when the word ‘convict’ was utilised and applied only to offenders passing through Great Britain in order to commence a sentence of transportation in Australia. Section XXVI reversed the English and New South Wales cases – *Bullock v. Dodds* and *Eagar v. LeMestre*, which had prevented capitally sentenced convicts who received pardons in New South Wales from subsequently holding property unless the pardon had been passed under the Great Seal of Great Britain.<sup>53</sup> Finally, Section XXIX of the statute repealed those parts of the legislation that it replaced.<sup>54</sup>

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<sup>52</sup> AGL Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London, 1966), pp. 353-4.

<sup>53</sup> Section XXVI went beyond what was necessary. The decision in *Bullock v Dodds* strictly only applied to capital respites, i.e. those offenders ordered to transportation who were subject to felony attain, rather than sentenced to transportation which did not carry the stigma of felony attain. Confusion about the effect of the application of *Bullock v Dodds* in New South Wales led to the legislation covering all forms of transportation to New South Wales and Van Diemen's Land. *Bullock v. Dodds* was a decision by King's Bench on 23 January 1819. See 2 B. & ADL. 258-278; 106 *English Reports*, pp. 361-8. *Eagar v. LeMestre* was not reported but is discussed at length in Commissioner Bigge's First Report at pp. 131-4.

<sup>54</sup> This included 4 Geo I c. 11, some of which persisted into the twentieth century because of its other provisions on the matter of piracy.

One interesting element of Hobhouse's drafting of 5 Geo IV c. 84 needs highlighting. Between 1784 and 1821, all legislation re-enacting or extending transportation, did so using the form of the 1784 statute 24 Geo III c. 56 which contemplated only 'transportation'. But, it will be recalled, the language of the 1785 statute, 25 Geo III c. 46, which authorised transportation from Scotland had contemplated not just transportation but 'banishment' and had used the language of 'adjudgement' in a reference back to earlier Scottish practice. Hobhouse's drafting of 5 Geo IV c. 84, for reasons which are not clear, used the Scottish formulae such as 'banishment' and 'adjudgement,' but followed the 1816 argument of the Law Officers' advice to the effect that the statute, not the sentence, determined status in New South Wales. No provision of the statute ever contemplated 'banishment' except, perhaps, as mentioned above, the possibility of self-transportation mentioned in Section XXII.<sup>55</sup>

One other interesting aspect of the passage of the legislation through parliament during May and June of 1824 was the extent to which the legislation reflected the combined views of the Home Department and the War and Colonial Office, or whether it reflected only the views of the Home Department. During Peel's second reading address in the House of Commons on 4 June 1824 explanations about the bill were given by both Secretary of State Peel, from the Home Department as well as by Robert Wilmot-Horton, from the War and Colonial

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<sup>55</sup> The use of 'banishment' alongside 'transportation' continued to confuse. In a discussion at the House of Commons Select Committee into transportation in April 1837 transportation only followed by assignment, and not additional punishment measures such as working in irons or spending time at a penal settlement, was viewed only as banishment. See the discussion between Charles Buller and Forbes, *Report of the Select Committee on Transportation*: (House of Commons paper no. 518: London, 1837), paras 1377-1387.

Office, suggesting an element of co-operation, as well as mutual understanding.<sup>56</sup>

However, in view of the confusion caused in New South Wales and Van Diemen's Land by the wording of some of the provisions of the legislation, it is possible that the War and Colonial Office were not informed about the legislation. Certainly, it became evident by the beginning of 1825 that neither Earl Bathurst nor his Under Secretary, Robert Wilmot-Horton, took steps to inform Sydney and Hobart Town of the changes.

The implications of 5 Geo IV c. 84 were significant in the evolution of transportation from Great Britain. Rather than leave issues about the determination of the status of convicts transported to New South Wales and Van Diemen's Land up to colonial laws, from mid-1824 laws enacted in Westminster would make these determinations. Up until this time, with the exception of the structures of the courts in New South Wales, Van Diemen's Land, and Norfolk Island the emerging common law of New South Wales had determined that an arriving convict would be assigned to the governor, whether or not the proper formalities had been completed. Section II of 5 Geo IV c. 84, made issues of process irrelevant; the laws of Great Britain directly operated in the Australian colonies to bring about that effect.<sup>57</sup>

Before considering the effects of the new legislation in the Australian colonies, we should note one other development in England that touched on the events that followed. In March 1825, the War and Colonial Office broke with past practice by

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<sup>56</sup> House of Commons *Hansard* for 4 June 1824, Second series, Volume 11, columns 1092-3.

<sup>57</sup> See Alan Atkinson, "The Free-Born Englishman Transported: Convict Rights as a Measure of eighteenth-Century Empire", *Past and Present*, No. 144 (1994), pp. 88-115, at p. 115. Atkinson was comparing developments in colonial America with those in New South Wales in the context of increasing British imperial hegemony.



reconsidering the formal Instructions issued to incoming governors of New South Wales. On 27 March 1825, the permanent legal counsel to the Colonial Office James Stephen set out his thoughts about framing new Instructions.<sup>58</sup> The Instructions issued to earlier governors had all followed, almost exactly, the form prepared in April 1878 for Arthur Phillip. Those Instructions had made scant mention of the governors' duties towards the convicts. They all had, however, contained the original Instruction issued to Phillip to ensure that he received the assignment of the services of the property of incoming convicts from the transportation contractor. Stephen thought this could be omitted in future, along with any references to the management of the convicts, which would be left a matter for regular despatches. In effect then, while Earl Bathurst had been attempting, over the previous six years, to increase the rigour of the punishment of transportation, the new governor, Sir Ralph Darling, was to be issued with instructions that framed a civil colony, soon to have a form of representative government. The management of convicts in New South Wales and Van Diemen's Land was to be controlled, not by instructions as much, but by the provisions of Section VIII of 5 Geo IV c. 84.

Turning now to the second question: how did the new legislation deal with the issue of property in the service of transported convicts?

Looked at from a British perspective, the passage of the act 5 Geo IV c. 84 and the resulting alteration to the processes, whereby property in the service of the offender was transferred to the governors of New South Wales and Van Diemen's Land upon arrival, was implemented almost immediately. The last convict

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<sup>58</sup> Stephen to Horton, 27 March 1825; *Historical Records of Australia, Series 4* (hereinafter 4 HRA), Volume 1, pp. 591-612.

transport to depart England for the Australian colonies prior to 5 Geo IV c. 84 becoming law was the *Chapman*, which departed on 6 April 1824 and arrived at Hobart Town on 27 July 1824.<sup>59</sup> Thomas Shelton's un-presented account for the documentation covered thirty-four different jurisdictions and he had intended to charge £92-8-6d for his services.<sup>60</sup> The first convict transport to depart England after 5 Geo IV c. 84 became law was the *Princess Charlotte* which departed the Downs on 9 July 1824 for Van Diemen's Land.<sup>61</sup> Shelton's account omitted any reference to different jurisdictions and the intended charge dropped to £13-3s.<sup>62</sup> Shelton's accounts thereafter reflected similar low costs due to the absence of any need to deal with each sentencing jurisdiction. Shelton's account for the *Henry*, mentioned below, was only £9-16s.<sup>63</sup>

Looked at from the perspective of the colonies of New South Wales and Van Diemen's Land, however, the passage of 5 Geo IV c. 84 proved to be more of a problem. First, it became clear that no one in London had bothered to communicate with, or even consult, the colonial authorities about the legislation and its revised approach to the management of convicts. This even went to the extent of not bothering to inform the colonies of the passage of the new legislation or to send them copies. Second, once the text of 5 Geo IV c. 84 became available in the colonies, it immediately became clear that, at least as the colonial governors saw the position, their capacity to manage the convicts within the colony had been severely restricted in two ways. Their power to remit sentences had been heavily

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<sup>59</sup> Charles Bateson, *The Convict Ships 1789-1868* (Glasgow, 1969), pp. 358-9. The deed of assignment is held at the Tasmanian Archive and Heritage Office: Convict assignment lists and associated papers, 1 January 1824-31 December 1826, CON 13/1/3, p. 131.

<sup>60</sup> Account No. 149: Audit Office file AO 3/291, ff. 1373-8, TNA.

<sup>61</sup> Bateson, *The Convict Ships 1789-1868*, pp. 358-9.

<sup>62</sup> Account No. 150: AO 3/291, ff. 1380-1, TNA.

<sup>63</sup> Account No. 154: AO 3/291, f. 1388, TNA.

curtailed, while the legislation itself also contemplated sub-assignments of convicts between settlers. The power to conditionally remit sentences, particularly through the use of tickets of leave, had become a standard tool in the armoury of colonial governors in managing good behaviour and encouraging diligence and reform, but it rested on the fundamental capability of governors to revoke assignments. The issue of sub-assignments had never been sanctioned in the colonies and had been specifically prohibited by Governor Macquarie in 1813.<sup>64</sup>

It took until 1827, and new legislation (9 Geo IV c. 83), to resolve the issue to the satisfaction of the colonial governors. Unfortunately, the New South Wales Supreme Court took the view in 1829 that the legislative correction of 1827 was insufficient for all purposes, leading to a further disagreement between the judges and the government in London. This disagreement was resolved, somewhat unsatisfactorily, in 1830. For the purposes of this thesis, however, the value of the disputes between London and the colonies lies in the commentary that was provided around the meaning of ‘property in the service’ of transported offenders. While much of the ensuing opinion focussed on the governors’ powers of revocation of assignment, at least three commentaries were forthcoming about the underlying nature of property in the service of the offender and its role in the transportation of convicts to New South Wales and Van Diemen's Land.

On 10 February 1825 Lieutenant-Governor Arthur wrote to Robert Wilmot-Horton in London to report the arrival in Hobart Town of the transport ship *Henry*

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<sup>64</sup> Government and General Order of 24 July 1813. A copy of this Order was sent to Hay in London by Arthur on 4 June 1826: *Historical Records of Australia, Series 3* (hereinafter 3 HRA), Volume 5, p. 280.

two days earlier.<sup>65</sup> The ostensible purpose of the letter was to report the safe arrival of seventy-nine female convicts transported to Van Diemen's Land.<sup>66</sup> One of the convicts, identified in the indent as Maria Wilkinson, but under her subsequent married name of Jane New, was to have a brief, but central, role in the interpretation of the governors' powers under the 1825 statute 5 Geo IV c. 84 and Section IX of the 1827 correcting legislation, 9 Geo IV c. 83. Arthur pointed out to Wilmot-Horton that no deed of assignment had been received for the seventy-seven female convicts on the *Henry*. He also pointed out that this had also occurred at the end of 1824 when the transport *Princess Charlotte* had arrived, also without any deed of assignment. In the absence of these deeds, Arthur pointed out that he lacked 'any Legal Title to their services.'<sup>67</sup> To underscore his concern, Arthur repeated the complaint of Governor Phillip some thirty-six years earlier about lack of clarity surrounding the lengths of sentences of newly arriving convicts. More prescient, however, was his anxiety that with press freedom and jury trials now available in the colony, he was keen not to be exposed to legal proceedings surrounding the 'servitude of any Prisoner'.<sup>68</sup>

The same diligence with regard to documentation respecting arriving convicts does not appear to have been observed in New South Wales. That colony had abandoned the practice of reporting the arrival of each transport back to London. Accordingly, there is no record of anyone in Sydney noticing the absence of any

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<sup>65</sup> Arthur to Under Secretary Horton, 3 *HRA*, Volume, 4, p. 236-7.

<sup>66</sup> The *Henry* had sailed from London on 2 October 1824 and arrived at Hobart Town on 8 February 1825. Bateson, *The Convict Ships 1789-1868*, pp. 358-9

<sup>67</sup> Arthur to Horton, 3 *HRA* 4, pp. 236.

<sup>68</sup> Arthur to Horton, 3 *HRA*, Volume 4, p. 237

deeds of assignment for the first three convict transports; the *Mangles*, the *Minerva*, and the *Grenada* to leave England after 5 Geo IV c. 84 became law.<sup>69</sup>

Mysteriously, two days before Arthur wrote to Wilmot-Horton, on 8 February 1825 Francis Forbes the chief justice of New South Wales also wrote to Wilmot-Horton. Forbes covered a wide range of issues about the administration of justice in the colony and the practices of the governor, Sir Ralph Darling. He concluded the letter with some concerns about what he referred to as 'Mr Peel's Act' meaning 5 Geo IV c. 84. How Forbes had received a copy of the text, and when, is not clear.<sup>70</sup> Forbes's concern about the wording of 5 Geo IV c. 84 was his understanding that Section VIII reduced the capability of the governors to grant a licence or ticket of leave.<sup>71</sup> Forbes referred to this as 'a deadly blow to the great principle of reformation in the Colony.' He went on to suggest to Wilmot-Horton that 'such vital alterations should be suspended, until the opinions of the local authorities can be had'. Perhaps this suggestion prevented him communicating the matter to Sir Thomas Brisbane or to incoming Governor Darling who arrived in New South Wales on 19 December 1825.

As mentioned above, prior to Sir Ralph Darling's appointment as governor, James Stephen at the War and Colonial Office had worked on revising the Instructions issued to the governors of New South Wales. In a wide-ranging issues paper prepared on 25 March 1825 for use by Robert Wilmot-Horton, Stephen canvassed

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<sup>69</sup> Bateson, *The Convict Ships 1789-1868*, pp. 344-5.

<sup>70</sup> Forbes's letter of 8 February 1825 is set out in JM Bennett, ed., *Some Papers of Sir Francis Forbes: First Chief Justice in Australia* (Sydney, 1998), pp. 53-5. Forbes had travelled from England to Sydney on the convict transport *Guildford* which had sailed from Southampton in August 1823, too early for a copy of the text to have been available to him in England. The tone of Forbes's letter suggests it may have come from Wilmot-Horton, but there is no explanation why Governor Darling and Lieutenant-Governor Arthur had not been sent copies.

<sup>71</sup> Forbes did not specify Section VIII; but it is clear from his letter that he was referring to it.

what should be included and what omitted from the Instructions. When he reached the question of whether specific Instructions should be prepared on the management of the convicts in New South Wales, Stephen looked briefly at the new legislation 5 Geo IV c. 84 which, on the status of the convicts, he summarised in the following terms:

parliament has granted to the Governor of New South Wales, what may be termed a fiduciary property in the Services of the Convicts, with a power of alienation to other persons, who will acquire a beneficial Interest in this species of property, an interest which, when once created, may be transferred, by Successive Alienations, to any number of successive owners.<sup>72</sup>

Stephen did not mention for whom the ‘fiduciary property’ or the ‘beneficial Interest’ were held. Francis Forbes was to use similar circumlocution in 1827 when he concluded that the governor, on receipt of a convict, became ‘a trustee of his services for the purposes of the colony.’ Stephen’s reticence may have an explanation in his role as a leading abolitionist of the slave trade in the British Empire. His immediate next comment was to attempt to differentiate the position of a transported convict ‘whose services have been thus alienated’ from that of a slave. He saw similarities in the fact that both the ‘alienated’ convict and the slave were required to work for the profit of masters from whom they received no wages, and lacked the power to quit. To Stephen, the distinction lay in the fact that ‘the Convict does not transmit his own condition to his posterity’ and that he might be emancipated by the governor without the consent of the master. Any reticence on Stephen’s part on the proprietary status created with respect to transported convicts might explain his absence from any aspect of the subsequent discussions on the effects of Section VIII of 5 Geo IV c. 84.

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<sup>72</sup> 4 *HRA* 1, pp. 591-612, at pp. 607-8.

Stephen rationalised the inclusion of the ‘alienation’ power in an argument which followed almost exactly that set out in the recital to the 1766 statute, 6 Geo III c. 6. There it was argued that property in the services of offenders was necessary to enable colonial masters in America (in the absence of the government) to control their assigned servants.<sup>73</sup> Stephen recognised that the employment of convicts by settlers raised possible issues of control. He stated: ‘for, being once at large, and not in the precincts of any place of confinement, it might seem difficult to invest the Master with any lawful authority or control over them, except by giving him an actual property in their services.’<sup>74</sup> Reflecting his anti-slavery sentiments, Stephen went on to warn of the dangers of such power in the hands of colonial masters’:

But as the enjoyment of every description of authority is more or less restrained and qualified by the Same Law which creates and protects it, so such restraints are emphatically necessary, when the subject of property is the Service of Man. Hence, therefore, I infer that the Governor of New South Wales should be instructed to make all Grants of Convict Service, under the Act of Parliament, conditional on the observance of such necessary rules, as may be laid down for the prevention of abuses by the Grantee.<sup>75</sup>

As will be seen below, Stephen’s advice appears to have been accepted.

The response from London to Lieutenant-Governor Arthur’s letter of 10 February 1825 came in a letter dated 30 November 1825 from Under-Secretary Robert William Hay, newly-arrived at the War and Colonial Office.<sup>76</sup> Hay sent Arthur what appeared to have been his first copy of the full text of act 5 Geo IV c. 84. This arrived in Hobart Town on 18 May 1826, almost two years after the passage

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<sup>73</sup> See Chapter 4.

<sup>74</sup> 4 *HRA* 1, p. 608.

<sup>75</sup> 4 *HRA* 1, p. 608.

<sup>76</sup> Hay to Arthur; 30 November 1825: 3 *HRA* 4, p. 386

of the legislation through the parliament at Westminster.<sup>77</sup> Arthur immediately raised his concerns about the impact of Section VIII which, as he read it, allowed a settler to re-assign a convict to a third party. Arthur pointed out the ‘evil’ of this possibility, referring back to local regulations from as far back as Macquarie’s time which prevented re-assignment.<sup>78</sup>

On 17 February 1827 the *Australian* in Sydney published the full text of Section VIII of 5 Geo IV c. 84 and brought the issue of sub-assignment into the open.<sup>79</sup> Two days later, in London, Earl Bathurst wrote to Governor Darling. Without mentioning Arthur’s correspondence, but clearly with Arthur’s difficulty in mind, and referring to Macquarie’s Government and General Order of 1813, and concerned about ‘similar doubts occurring in New South Wales’, Bathurst sent Darling an opinion prepared by Henry Hobhouse at the Home Department to the effect that Section VIII of 5 Geo IV c. 84 ‘neither precludes, nor was [it] intended to preclude’ local government making regulations regarding re-assignment.<sup>80</sup> The only condition, as stated by Hobhouse, and re-stated by Earl Bathurst, and probably reflecting the views of James Stephen was that the assignee (the settler) be first ‘apprized’ of the conditions under which the original assignment was made. Similar advice was sent to Lieutenant-Governor Arthur on 20 February 1827.<sup>81</sup>

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<sup>77</sup> Arthur to Hay, 4 June 1826; 3 *HRA* 5, pp. 279-80.

<sup>78</sup> Arthur to Hay, 4 June 1826; 3 *HRA* 5, p. 280. Arthur enclosed a copy of Macquarie’s Government and General Order of 24 July 1813.

<sup>79</sup> Further material on the issue appeared in the *Australian* on 13 July, and 17 August 1827; in The *Sydney Gazette* on 17 March, 4 July, 3 August, and 20 August 1827; and in the *Monitor* on 17 July, 2 August, 27 August, and 20 August 1827.

<sup>80</sup> Bathurst to Darling, 19 February 1827. Hobhouse’s opinion was dated 13 February 1827. 1 *HRA* 13, pp. 115-6.

<sup>81</sup> Bathurst to Arthur, 20 February 1827; 3 *HRA* 5, pp. 525-6.



On 6 March 1827 Forbes again raised the issue of the language of Section VIII in a private letter to Robert Wilmot-Horton in London. In his 1825 letter, when he first saw the text of the legislation, he only identified the possible prohibition to the use of tickets of leave that would flow from Forbes's initial characterisation of the restated wording of property in the service of the offender in Section VIII of 5 Geo IV c. 84. However, by 1827, Forbes had adopted a far more critical line, not just against the limitations of the revocation power of the governor, but also against the failure of Governor Darling to take legal advice from him on how best to manage the implications of the legislation.<sup>82</sup> Forbes was critical of Governor Darling's illegalities which, Forbes argued, would have been avoided had Darling first sought the advice of the Executive Council. In his opening comments on the issue of the legislation and the convicts, Forbes made the point that the law respecting property in the services of the convicts before 1824, 'was very much at large, if indeed there could in strictness be said to be any law at all'.<sup>83</sup> This view would confirm the arguments presented in Chapters 5, 6, and 7 to the effect that successive governors of New South Wales had determined what the laws respecting the status of convicts would be and recourse from London was rarely sought, and guidance was rarely offered.

Forbes launched into an extended criticism of Darling's administration and its use of assignment and revocation in New South Wales. He opened his criticism by stating how he understood the law with respect to servitude to be prior to 24 June 1824.

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<sup>82</sup> 4 *HRA* 1, pp. 688-702.

<sup>83</sup> 4 *HRA* 1, p. 695. Forbes cited Bigge on this point, but referred to 'Bigge at 198'. This may be a printing error and should have read '168'.

Before the passing of Mr. Peel's act, servitude was rather an argumentative inference from the tenor of the sentence of transportation, than a clear penalty of the law, and the title of the assignee to the services and control of the convict rested upon a still less intelligible basis<sup>84</sup>

Reflecting some hitherto unexplained insight into the passage of the legislation, Forbes argued that Section VIII of 5 Geo IV c. 84 was intended to remedy these 'uncertainties'. After reciting the terms of Section VIII, Forbes offered his own explanation for why the legislation adopted the particular formula:

One of the objects of this law appears to have been to prevent servants, who had become useful to their masters, being with-drawn from their service at the mere will of the governor. It was apparent that many inconveniences would have attended this law, if literally enforced; some would have servants whom they did not want or could not manage, and whom they could not get rid of, while others would be in want of servants without the means of procuring them; to be sure the power of assigning from one to another might be supposed to provide a remedy for this, but such a power, in the general form conveyed by the act, might and would have led to many abuses.<sup>85</sup>

This seemed to be at odds with James Stephen's comments in 1825. Whether Forbes was aware of those comments is uncertain. Forbes went so far as to suggest that the dilemma posed by Section VIII, that is that settlers could re-assign convicts to other settlers, was in fact occurring:

the dispositions of different settlers have been put to the test, some assenting to the indulgence granted their assigned servants, and others refusing to allow it.<sup>86</sup>

The views of Chief Justice Forbes on the operation of Section VIII were shared by Chief Justice John Pedder in Van Diemen's Land, who went as far as suggesting

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<sup>84</sup> 4 *HRA* 1, p. 696. Forbes was to repeat these views to the 1837 Select Committee.

<sup>85</sup> 4 *HRA* 1, p. 696.

<sup>86</sup> 4 *HRA* 1, p. 697. For an extensive discussion on the assignment of convicts between settlers, see B Kercher, "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850", *Law and History Review*, 21 (2003), pp. 570, 575-80.

that settlers would have otherwise been unaware of their potential capacity to re-assign convict servants.<sup>87</sup>

Before Earl Bathurst's supposed letters of comfort reached the Australian colonies, events in New South Wales had taken on a life of their own. Chief Justice Forbes had voiced his concerns about the operation of Section VIII of 5 Geo IV c. 84 at a meeting of the Executive Council, pointing out that once an assignment had been made by the governor, the government lost 'controul' over assigned convicts because, by operation of the legislation, the assignee acquired the same rights as the governor had acquired. Forbes further pointed out that the purpose of Section VIII was that convicts should be assigned and that therefore the governor 'was in fact bound to assign them' and could not retain their services for government work. Governors had also lost the capability of granting tickets of leave to an assigned convict. Governor Darling referred the matter back to London for advice, pointing out that the *Australian* was pursuing the same argument.<sup>88</sup>

In June 1827 the implications of Section VIII were played out before the Supreme Court of New South Wales. An assigned convict, William Harris, had been detained by the authorities to appear as a witness at a forthcoming criminal trial without the concurrence of his master. In a habeas corpus application, the Court was called upon to consider whether the seizure was lawful.<sup>89</sup> According to some reports of the case, Chief Justice Forbes, after concluding that the colonial governor could not 'restrain' the operation of an act of the Westminster

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<sup>87</sup> Pedder to Arthur, 10 March 1827: comprising Enclosure 3 to Arthur's despatch to Under Secretary Hay dated 23 March 1827; 3 *HRA* 5, pp. 665-89, at p. 686.

<sup>88</sup> Darling to Bathurst, 1 March 1827, pp. 135-41, at pp. 137-8.

<sup>89</sup> *In re Harris* [1827] NSWSupC 43 reported at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1827/in\\_re\\_harris/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/in_re_harris/)

parliament, summarised the operation of what he referred to as ‘Mr Peel’s act’ to the effect that:

the property of the assigned prisoner vests solely in the individual to whom he is assigned. If the Governor were to take away a servant without the assent of the master, what was to become of Mr Peel’s Act? – the government cannot take a servant away.

Before the correspondence from Forbes and Arthur reached London, on 30 April 1827 Earl Bathurst was replaced as Secretary of State for War and the Colonies by Viscount Goderich. Another series of short term Tory appointments followed. Goderich remained in office only until 3 September 1827 when he moved to take on the role of Prime Minister. Goderich was replaced by William Huskisson, who resigned 30 May 1828 to be replaced by Sir George Murray, who remained in office until the end of 1830. Robert Wilmot-Horton retired from the War and Colonies Office in January 1828 apparently taking most of his correspondence from the colonies with him.<sup>90</sup>

On 1 April 1828 Secretary of State Huskisson introduced a bill for an *Act to provide for the Administration of Justice in New South Wales and Van Diemen’s Land, and for the more effectual government thereof, and for other Purposes relating thereto*. Royal assent was given to the legislation, 9 Geo IV c. 83, on 25 July 1828. The principal purpose of the legislation was to establish limited forms of representative government in the Australian Colonies. In a clear response to the queries raised by Arthur and Darling, authority for colonial governors to revoke convict assignments was set out in Section IX. However, as will be seen below, the authority was not quite in the terms sought by the colonial governors, nor in

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<sup>90</sup>JM Bennett points out that Wilmot-Horton took many of the Colonial Office papers with him on retirement. Some are now in the Catton Collection. Bennet, ed., *Some Papers of Sir Francis Forbes* (Sydney, 1998), pp. viii-ix.

wording which put the matter beyond doubt. Murray sent a copy of the new legislation to Darling on 31 July 1828.<sup>91</sup> On 30 August 1828 Murray alluded to the issue again in a letter to Darling admitting that Forbes had been correct (and Darling wrong) on the interpretation of 5 Geo IV c. 84 in 1827, but the recent alteration to the law (9. Geo IV, c. 83) would put the matter to rest.<sup>92</sup>

On 6 January 1829 the convict Jane New, who had arrived in Hobart Town in the *Henry* in 1825 and now resided in Sydney, was convicted of theft with a sentence of death recorded. While in Van Diemen's Land, Jane New had been assigned to her husband James. With the approval of Lieutenant-Governor Arthur, she had accompanied her husband to Sydney for employment. The practice of convicts transported to one colony moving to the other while still under sentence had been utilised occasionally, but does not appear to have been understood in London. Jane New's conviction was duly reported to the Executive Council, where it was noted that the legislation under which she had been convicted had been repealed in England. Accordingly, her sentence was quashed by Governor Darling who ordered that she be detained so as to be sent back to Van Diemen's Land to complete her original sentence. In effect, Darling revoked the assignment to her husband. James New then sought a writ of habeas corpus in order to ascertain whether his wife's continued detention was lawful. The *habeas corpus* action was heard in the Supreme Court in March 1829 with a judgement handed down by all three sitting judges on 21 March 1829. In determining the legality of her detention the judges held that the governor of New South Wales was not at liberty to revoke

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<sup>91</sup> Murray to Darling; 1 *HRA* 14, pp. 260-71. Murray pointed out that Section 9 had been inserted in the wrong place; Forbes opined that it should have been between Sections 33 and 34. See Forbes to Darling, 25 April 1829, 1 *HRA* 14, p. 765.

<sup>92</sup> 1 *HRA* 14, pp. 356-65, at p. 361. Kercher mentions that the justices in New South Wales knew of the passing of the legislation. Kercher, "Perish or Prosper", p. 579.

an assignment made in Van Diemen's Land in the circumstances of the case. She was therefore at large and should be returned to Van Diemen's Land to complete the term of her original seven year sentence of transportation. Having made this decision, but at the request of both counsel at the bar, the judges went on to offer an interpretation of Clause IX of the 1828 statute 9 Geo IV c. 83, which had been included into the legislation specifically to address the problems raised with the interpretation of clause VIII of the 1824 statute 5 Geo IV c. 86. Thus the judgement opened up two questions; the immediate problem of the power of colonial governors to revoke an assignment and the circumstances of convicts sentenced to transportation to a designated colony, being permitted to serve out part of their sentence in another colony.<sup>93</sup>

On 20 May 1829 Darling sent copies of the Supreme Court judgements to Murray, with explanatory comments from the judges.<sup>94</sup> On 2 June 1829 Arthur wrote to Twiss (successor to Hay) in similar terms complaining about the judgement.<sup>95</sup> Arthur repeated his concerns to Murray on 7 August 1829 and again to Twiss on 18 August 1829.<sup>96</sup> Murray sought opinions from the Law Officers and a history of the matter from Horace Twiss, his parliamentary under secretary.<sup>97</sup> Murray's response to Governor Darling, dated 30 January 1830 was copied to Arthur on the

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<sup>93</sup> The Supreme Court judgement has been analysed by a number of writers. See CH Currey, *Sir Francis Forbes: The first Chief Justice of the Supreme Court of New South Wales* (Sydney, 1968), pp. 341-48. See also Kercher, "Perish or Prosper", pp. 574-7. Carol Baxter's *An Irresistible Temptation: The true story of Jane New and a colonial scandal* (Sydney, 2006), though less of a legal analysis, nevertheless provides context for the events of the time.

<sup>94</sup> 1 *HRA* 14, pp. 762-77.

<sup>95</sup> 3 *HRA* 8, pp. 329-403.

<sup>96</sup> Arthur to Murray, 7 August 1829, 3 *HRA* 8, pp. 468-97 and 3 *HRA* 8, pp. 574-6.

<sup>97</sup> W. P. Courtney, 'Twiss, Horace (1787-1849)', rev. H. C. G. Matthew, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 [<http://www.oxforddnb.com/view/article/27917>, accessed 17 March 2015]

same day.<sup>98</sup> In his response, Murray put forward an extended criticism of the three Supreme Court judges and their judgements. Section IX of 9 Geo IV c. 83, Murray said, had been intended to confer unlimited discretion to the governors regarding the revocation of assignments. The Law Officers, according to Murray, were:

clearly of opinion that, under the 9th Section of the 9th Geo. 4, Cap. 83, a Governor can revoke the assignment of a Convict, of whose sentence it is not intended to grant any remission; and we think that there is nothing, either in the context or the apparent policy of the Act, which militates against this construction.<sup>99</sup>

Darling was directed by Murray to ‘carry the Act into Execution’ along the lines of the opinion of the Law Officers.<sup>100</sup>

As if to bolster London’s disapproval, Murray enclosed a paper prepared by Horace Twiss, who was also a King’s Counsel. Whether Twiss’s paper was prepared to assist Murray in developing a response to the Jane New decision, or even for the guidance of the New South Wales judges, is unclear. It amounted to a Colonial Office rebuke of the three judges, and of Forbes in particular, framed in the form of an appeal judgement. Twiss opened and closed with criticism of the court having entertained issues outside the requirements of the case before giving Forbes a lesson in statutory interpretation, which Forbes could not accept in his subsequent response. But, while his remarks are possibly unworthy, Twiss clarified some points that had been left outstanding from the inept management of the legislation by Hobhouse and Peel in 1824. Twiss argued with Forbes over the real intention behind the allocation of convict labour in New South Wales. Forbes

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<sup>98</sup> Murray to Darling, 1 *HRA* 15, pp. 346-53. Murray to Arthur 3 *HRA* 9, p. 42.

<sup>99</sup> Quoted by Murray, 1 *HRA* 15, pp. 346-53, at p. 346. Kercher pointed out that, in effect, the Law Officers were acting as a de facto court of appeal from judicial decisions made in New South Wales. See Kercher, “Perish or Prosper”, p. 579.

<sup>100</sup> 1 *HRA* 15, p. 346.

had taken the position that it was to provide servants to the settlers, whereas, according to Twiss, it was to save money for the British government.<sup>101</sup> In a sense, both were correct, but Twiss chose to consider the issue only in binary terms. Twiss, probably correctly, dismissed Forbes's recurring argument about the relevance of the compensation to the settler that had been contained in the 1717 statute 4 Geo I c. 11 to cover the contingency of the Crown pardoning a transported convict still in servitude.<sup>102</sup> Twiss pointed out how this old provision had been abandoned during the evolution of the transportation legislation after 1717.

The real value in Twiss's criticisms was that it put forward an explanation of the intent of the 1824 act 5 Geo IV c. 84 that had not been forthcoming from London in June 1824, or subsequently. At the end of his summation about the pre-1824 history of transportation from Britain, Twiss categorised all the prior processes as 'the old system of transportation'. In contrast, Twiss argued, the regime contained within 5 Geo IV c. 84 constituted 'the modern system of transportation', the essence of which lay in the new approach to an understanding of property in the service of the offender and the issue of revocation. Twiss explained this in the following terms:

The whole of the assumption, then, that the Settler has a right of property in the labour of the Convict, assigned to him either under the former or under the present system, is a mistake. What the Settler is now allowed by the law to enjoy is a mere indulgence: a temporary, revocable loan of services, for which he has given no consideration, and to which he has therefore no title but thro' favour of the Grantor; a benefit held at the pleasure of the Crown.<sup>103</sup>

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<sup>101</sup> 1 *HRA* 15, p. 350.

<sup>102</sup> 1 *HRA* 15, p. 351.

<sup>103</sup> 1 *HRA* 15, p. 351.



Later in his paper, Twiss referred to the assignment of a convict's services as being 'a tenancy at will'.<sup>104</sup> So, while underscoring the proprietary nature of property in the labour of convicts, Twiss's language reinforced the discretionary role of the colonial governor in creating and revoking the assignments of convict servants to settlers.

The approach adopted by Twiss was fundamentally different from any previous statement on the meaning of Section VIII of the 1824 statute. Forbes must have found the new formula at odds with the language used by Henry Hobhouse, although he did appreciate that, after some six years, the purpose behind the restated formula of property in the service of the offender had been explained.<sup>105</sup> Whether Forbes was convinced by Twiss's explanation of the intention is not clear. In later comments Forbes never used the language deployed by Twiss. The question left unanswered was, if Twiss was correct, why had Hobhouse used such florid language, and why were the rights of the assignees made equal to the rights of the governor? Did the governor also only receive 'a mere indulgence', 'a temporary, revocable loan of services' or 'a tenancy at will' of each newly arrived convict? Cowed by the criticism of Sir George Murray and the sustained objections of Horace Twiss, Forbes acquiesced with the views from London. In a letter dated 19 July 1830 and sent to London by Governor Darling, Forbes argued his case as best he could, pointing out the awkward position in which the judges had been placed at the Jane New trial and their honest attempts to interpret the

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<sup>104</sup> 1 *HRA* 15, p. 363. A tenancy at will describes land or a tenement which is determinable at the will of either the landlord or the tenant. Frederick Stroud *The judicial dictionary of words and phrases judicially interpreted: to which has been added statutory definitions*, Volume 3, (London, 1903), pp. 2023-4.

<sup>105</sup> 1 *HRA* 15, p. 666.

provision of 9 Geo IV c. 83 only on the wording of the legislation and in the absence of any guidance of the parliament's (or Peel's) intentions in 1824.<sup>106</sup>

The upshot of Murray's correspondence, together with the advice of the law officers and the paper prepared by Twiss, had the effect of shutting out the line of reasoning by the Supreme Court in *Jane New's* case. Despite the elaborate language of Henry Hobhouse in Section VIII of 5 Geo IV c. 84, it was now resolved that the colonial governors did have the power of revoking assignments unconditionally. As Twiss pointed out in his paper, despite the wording of the acquired rights of assignees of convicts' services, their rights were not proprietary but, rather, a benefit held from the Crown.<sup>107</sup> The issue of convicts still under sentence moving between colonies was resolved by legislation in London in 1830.<sup>108</sup> Forbes's acquiescence, while humiliating in its tone, did succeed nevertheless in clarifying the issue.

By 1830, and Forbes's acceptance of the advice from London, the issue of the governors' powers to revoke assignments had been more or less put to bed and the modern method of transportation continued to run its course. If Twiss had attempted to redefine the meaning of property in the service of the offender, little attention appears to have been paid to his opinion subsequently. This becomes clear from Forbes's letter to Andrew Amos at the end of 1836 and his evidence to the House of Commons Select Committee in April 1837.

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<sup>106</sup> Forbes to Murray, 1 *HRA* 15, pp. 664-9. Judge Dowling also wrote to Murray, via Darling: 1 *HRA* 15, pp. 708-11.

<sup>107</sup> Twiss's paper is set out in 1 *HRA* 15, pp. 348-51.

<sup>108</sup> 11 Geo IV & 1 Wm IV, c. 39; *An Act to amend an Act passed in the Fifth year of his present Majesty, for the Transportation of Offenders from Great Britain ; and for punishing Offences committed by Transports kept to labour in the Colonies*. The act received royal assent on 16 June 1830.

In April 1836 Forbes travelled to England on sick leave. In December 1836 he responded to questions on transportation posed by Andrew Amos, a British law reform commissioner. Forbes's response offered, by way of introduction, a summary of the law of transportation; i.e. the modern method, pointing out that it only applied to New South Wales and Van Diemen's Land. Transportation to Bermuda was noted, but not considered. Property in the service of transported convicts remained a central feature of the governor's powers, as did the restrictive colonial laws that controlled the behaviour of convicts and had the capability of reducing opportunities for early remission.<sup>109</sup> Expenses and cost savings were important, but Forbes was critical of the use of the punishment for its arbitrariness.

In April 1837, shortly after being knighted by William IV, Sir Francis Forbes appeared before the House of Commons Select Committee on Transportation. The Select Committee had been established on 7 April 1837 following pressure from the reformist Sir William Molesworth.<sup>110</sup> It had been directed 'to inquire into the System of Transportation, its Efficacy as a punishment, its Influence on the Moral state of Society in the Penal Colonies, and how far it was susceptible of Improvement.' The committee took evidence from ten witnesses including Sir Francis Forbes, George Arthur and James Macarthur.<sup>111</sup>

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<sup>109</sup> Forbes's letter to Commissioner Amos was set out as annexure 12 to the 1837 *Report from the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*. House of Commons Parliamentary Papers 1837 (518), pp. 283-6.

<sup>110</sup> The dates are taken from page ii of the report. Fifteen members were originally appointed to the committee, and one was added on 8 May. Sir William Molesworth chaired the committee which included the current secretary of state for the Home Department, Lord John Russell, past secretary of state, Sir Robert Peel, and future secretaries of state Sir George Grey (Home Department) and Viscount Howick (later 3<sup>rd</sup> Earl Grey) (Colonial Office).

<sup>111</sup> Forbes appeared on 14, 18 and 28 April and 2 May 1837. Forbes retired as Chief Justice of New South Wales on 1 July 1837 (while in England). He then returned to New South Wales and died in Sydney on 8 November 1841. C. H. Currey, 'Forbes, Sir Francis (1784–1841)', *Australian*

In evidence given to the Committee on 14 April, Forbes continued his analysis of the modern method of transportation he had summarised to Amos. With a small concession to the opinion of the advice of the law officers of January 1830 and, perhaps even to Horace Twiss, Forbes further summarised, what he referred to as ‘the law of transportation’, in the following terms (emphasis added):

The Transportation Act, 5 Geo. 4, c. 84, provides, that as often as a convict shall be sentenced to transportation, it shall be in the power of the Secretary of State to appoint a place within His Majesty’s dominions to which the convict shall be transported. It further directs, that on his arrival in the country he shall be delivered over to the governor, who shall have a property in the services of such convict, and who may assign such convict over to any resident within the colony, who shall have a like property in the services of the convict for the term of his transportation, with a power of assigning to any other person, *with the assent of the governor*, each assignee having a property in the services of the offender.<sup>112</sup>

The concept of property in the service of the offender seemed to trouble Sir William Molesworth and members of the Committee. Forbes was twice asked to explain it. When asked by Molesworth if a convict was a slave, Forbes responded in language that would have been readily understood by Sir Thomas Smith in 1582:

I cannot say that, because by the word ‘property,’ I mean such as the master has in his apprentice; I can only read the term property in the Act of parliament, as it is understood by the law. I know of no property in slaves now, since the abolition of slavery, but it is something analogous to the property a master has in his apprentice.<sup>113</sup>

But Forbes concluded his response with his view of property in the service of the offender as follows: ‘It is for this right of property that the whole authority over

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Dictionary of Biography, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/forbes-sir-francis-2052/text2545>, published first in hardcopy 1966, accessed online 9 October 2015.

<sup>112</sup> Para 93, pp. 7-8.

<sup>113</sup> Para 94, p. 8.

the convict is derived, and without it, I apprehend the convict, on being banished, would become free.’<sup>114</sup>

On 28 April 1837, Forbes was asked to explain to the committee some of his earlier comments to Andrew Amos. When asked a second time by Molesworth whether property in the service of the offender was the same as the property of a master in a slave, Forbes offered the following explanation:

I am not aware of any Act of Parliament which speaks of the relation between a master and his slave. Those are the words used in all the Acts of Parliament which have passed on the subject of transportation since the 4 Geo 1, which may be considered the first Transportation Act; it being recited that one of the objects of transportation was to supply the settlers with servants; and it goes on to enact that the assignee shall have a property in the services of the convict for the period of his transportation; and even in His Majesty’s prerogative of mercy should be interposed, the settler was formerly entitled to receive any sum he had paid to the original contractor for the services of the convict.<sup>115</sup>

While historically useful, Forbes’s comments were somewhat disingenuous suggesting that he had neither learned anything from the lengthy dispute with London, nor had he forgotten anything. Had he offered a view of his own earlier views about property in the service of the offender being necessary for the control of convicts away from the authority of the law, reminiscent of the 1766 preamble and James Stephen’s views on 1825, his responses may have had greater authority.

The Select Committee took until 14 July 1838 to present a detailed report, concluding, in the main, that transportation to the settled districts of New South Wales and Van Diemen’s Land should be discontinued as soon as practicable. In lieu, crimes then punishable by transportation should, in future, be punishable

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<sup>114</sup> Para 93, pp. 7-8.

<sup>115</sup> Para 1290, p. 83.

with hard labour for periods of between two and fifteen years. Hard labour could be served either in Great Britain or abroad.<sup>116</sup> In the event, hard labour came to be performed in Great Britain, to be followed by transportation by way of banishment. This arrangement, under the administration of Lord John Russell's Whig administration, was to be referred to as Grey's Exiles. Convicts arriving in Van Diemen's Land came with a ticket of leave and were entitled, indeed expected, to gain employment on their own account. "Transportation" in these circumstances was, in effect, banishment from Great Britain without any additional connotation of servitude.

It is now possible to respond to the second question being considered in this chapter: how did the legislation of 1824 deal with the issue of property in the service of transported convicts?

Despite the confusion created by the language and the manner of communicating the new legislation to the Australian colonies, by 1830 the meaning of Section 8 of 5 Geo IV c. 84 had been settled. Twiss's view of the modern method of transportation had prevailed. Property in the service of offenders was the legal device by which colonial governors acquired the services of transported convicts and deployed those services, either on public works or by private assignment, for a general public benefit. To the extent that convicts were assigned to settlers, the cost burden on government was mitigated. In its assigned form, property in the service of the offender also gave the settler-master some control over the activities of assigned convicts, with the formal power to take ill-disciplined convicts before magistrates for punishment and the informal power to withhold benefits. This was

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<sup>116</sup> *Report of the Select Committee on Transportation: together with the minutes of evidence, appendix, and index.* House of Commons Parliamentary Papers, 1837-38 (669), p. xlv.

not necessarily the role of property in the service of the offender in 1788, where the intention was probably to make available convicts services to Governor Phillip to deploy for public works. As the colony of New South Wales evolved, so the role of convict labour, and the understanding of property in the service of the offender, evolved into the position described by Forbes to the select committee. Whether property in the service of the offender was or was not a fiduciary proprietary interest, as Stephen and Forbes had thought in 1825 and 1827 respectively, was, after mid-1830, irrelevant. The system of transportation that had evolved between 1786 and 1824 had been replaced by an imperial system of transportation with London, not the colonies, directing colonial administration.

Perhaps this is no more evident than in the use of the language to describe convicts resident in the colonies. In correspondence between London and Australia, transports were invariably referred to simply as ‘convicts’. Early in 1827, the language altered. Government Regulations authorised by Governor Darling and published on 2 January started to utilise the term ‘prisoners of the Crown’.<sup>117</sup> A Government Notice published on 30 July 1827 with regard to the assignment of convicts referred to them repeatedly as ‘Prisoners of the Crown’.<sup>118</sup> In 1828, Governor Darling started to use the same phrase in his dispatches to London.<sup>119</sup> Also in 1828 ‘Prisoners of the Crown’ instead of ‘Convicts’ was utilised in colonial returns to London.<sup>120</sup> Even the judges in the *Jane New* case referred to convicts generally as ‘prisoners of the Crown’.<sup>121</sup> While ‘convict’ remained in use, the adoption of the alternative formula ‘prisoner of the crown’,

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<sup>117</sup> 1 *HRA* 15, p. 4

<sup>118</sup> Darling to Bathurst; 1 *HRA* 13, pp. 487-9, at pp. 488-9.

<sup>119</sup> Darling to Huskisson, 11 May 1828; 1 *HRA* 14, p. 165.

<sup>120</sup> Appendix 3 to Darling to Murray; 31 December 1828, 1 *HRA* 14, pp. 751-5, at p. 574.

<sup>121</sup> Judgement of Dowling J at 1 *HRA* 14, p. 773 and Stephen J at 1 *HRA* 15, p. 34.

made it abundantly clear that transported convicts in New South Wales were prisoners and no longer servants. In effect, the concept of ‘property in the service of the offender’ had fulfilled its initial (albeit unstated) purpose. But now that New South Wales and Van Diemen's Land were integral parts of an imperial criminal justice system, the real status of transported convicts was better reflected in revised language; servants had become prisoners.

Following criticism from New South Wales and the Molesworth Committee on 1837 and 1838, transportation to New South Wales ended in 1840. Thereafter, direct shipments of convicts were sent to Van Diemen's Land and to Norfolk Island (a dependency of Van Diemen's Land) between 1844 and 1853. The landing of the 207 male convicts from the *St Vincent* on 26 May 1853 in Hobart brought to an end the assignment of property in the service of the convicts first implemented in 1718.<sup>122</sup> As mentioned above, in 1823 Robert Peel had introduced *An Act for authorizing the Employment at Labour, in the Colonies, of Male Convicts under sentence of Transportation*, the act 4 Geo IV c. 47. The provisions of the legislation were re-enacted in 1824 as Section XIII of the 1824 *Act for the Transportation of Offenders from Great Britain*, 5 Geo IV c. 84. On 23 June 1824, an order in council designated both New South Wales and Van Diemen's Land as destinations for the receipt of convicts transported from Great Britain, but it went on also to designate Bermuda as a destination for offenders to be transported pursuant to Section XIII.<sup>123</sup> This was extended to Gibraltar in 1842 and to Western Australia in 1849. Transportation under these provisions was initially

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<sup>122</sup> Bateson, *The Convict Ships 1789-1868* (Glasgow, 1969), p. 370-1.

<sup>123</sup> Order in council of 22 May 1840, *Transportation of convicts. Order in council determining the places to which convicts may be transported*. House of Commons Parliamentary Papers, 1840 (352).



administered by the Home Department and convicts, at the end of their sentences were returned to Great Britain.<sup>124</sup> The transportation of convicts to Western Australia between 1850 and 1868 was carried out under this legislative regime. No property in the service of these convicts ever came into being.<sup>125</sup>

By way of a post script to this chapter and, indeed, to the entire thesis; in 1853 legislation applicable to the entire United Kingdom of Great Britain and Ireland started the process of replacing transportation from Great Britain with penal servitude to be undertaken within Great Britain.<sup>126</sup> In 1857, the act of 1853 was further modified by 20 & 21 Vict c. 3. Section II ended sentences of transportation. Section III specified that all existing provisions surrounding the practice of transportation, including the ‘Custody, Management, and Control, and the Property in their Services’ shall apply to persons under sentence or order of penal servitude. In 1899, HB Simpson summarised the position in the following terms: ‘it appears, therefore, that the legal theory still in a manner subsists whereby the State, now represented by the Directors of Convict Prisons, has a right of property in their service’. He went on:

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<sup>124</sup> Earl Grey, *The Colonial Policy of Lord John Russell's Administration*, Volume II, (London, 1853), p. 32. See also Grey's evidence to House of Commons Select Committee on Transportation in 1856. *First Report from the Select Committee on Transportation; together with minutes of evidence, and Appendix*. House of Commons Parliamentary Papers, 1856 (244), pp. 160, 166.

<sup>125</sup> See the evidence to the 1861 House of Commons Select Committee: *Report from the Select Committee on Transportation; together with the proceedings of the committee, minutes of evidence, appendix, and index*. House of Commons Parliamentary Papers, 1861 (286), p. 58 (paras 1410 and 1411), pp. 32-2 (paras 806 and 807). By 1840s, the scheme was administered by the Colonial Office.

<sup>126</sup> 16 & 17 Vict c. 99. The legislation did not operate geographically, but the text made it clear that the executive provisions of the legislation were to be exercised in Ireland by the Lord Lieutenant, while those in Great Britain were to be exercised by the secretary of state for the Home Department.

The historical distinction between a prisoner under sentence of penal servitude and one sentenced to imprisonment with or without hard labour has been largely obliterated in practice, but in law it remains very noticeable as a curious relic of the past.<sup>127</sup>

After a period of 140 years since its first inception in 1717, property in the service of offenders had finally been repatriated back to the United Kingdom.

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<sup>127</sup> HB Simpson, 'Penal Servitude: Its Past and Its Future', *The Law Quarterly Review*, 15 (1899), pp. 33-50, at p. 42.

### **Conclusion:**

This thesis set out to find a meaning for the formula ‘property in the service of the offender’ used in the 1717 statute 4 Geo I c. 11 for the transportation of convicts.

The evidence suggests that property in the service of offenders was invoked by the British parliament to provide transportation contractors with a marketable commodity—the labour of the convicts—which they could sell into the labour market in colonial America. It would seem reasonable to conclude that the formula was devised by the parliamentary committee chaired by Sir William Thomson. The intention was to avoid the use of compulsory indentures which had proved problematic to Sir Thomas Johnson, another member of the committee, in his attempt to transport Jacobite rebels to the Americas following their defeat at the Battle of Preston in 1716. In 1719, the parliament of the Kingdom of Ireland, in comparable circumstances chose to retain the use of indentures compulsorily imposed upon offenders prior to transportation from Ireland.

The law of master and servant had taken on a distinctly colonial character in Virginia during 1619, if not earlier. Surviving evidence makes it clear that forms of indentures were devised which had no parallel in contemporary England, with the possible exception of apprentices. The status of servants in Virginia after 1619 was determined by local law and could arise even where there was no formal documentation framing the relationship of master and servant. The status that evolved, referred to in Virginia as ‘servitude’, was extended to all servants arriving in Virginia whether they had indentures or not, including offenders

transported to Virginia from England and was tacitly recognised in the English transportation legislation of 1662.<sup>1</sup>

English legislation in 1597 authorised sentences of banishment for rogues, vagabonds, and sturdy beggars. These were objects of punishment simply because they displayed no propensity to labour or to conform to the norms of the early modern perception of a hierarchical England as described by Sir Thomas Smith in 1585.<sup>2</sup> Their treatment had its origins in the Tudor practice of sending such offenders back to their place of origin where, in the language of at least one Elizabethan statute, they ‘would labour as a true subject ought to do’.<sup>3</sup> Sending them home, at least to Tudor and Jacobean legislators, solved a contemporary anxiety around the idea of the ‘masterless man’ and ensured delinquents would labour for a master. The punishment of transportation extended this practice across the Atlantic.

Unlike legislative authority, the prerogative of mercy was initially used more narrowly. Felons were pardoned or reprieved and shipped as servants for the benefit of the East India Company in 1615 and then for the benefit of merchants with interests in America who had influence at, or at least access to, the royal court. At court, the prerogative of mercy was exercised, initially by committees of the Privy Council, and then by the monarch. During the 1620s, while the different processes of statutory sentences or prerogative reprieves had different origins, any differences in implementation conflated into a more or less uniform process and a

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<sup>1</sup> 14 Car II c. 12.

<sup>2</sup> Mary Dewar, ed., *De Republica Anglorum* (Cambridge: 1982). Book I, Chapters 16-24, pp. 64-77.

<sup>3</sup> See, for example, 22 Hen VIII c. 12, section III.

unitary outcome: the offender was transported to America in order to labour as a servant for a colonial master.

Legislative experiments in the use of transportation made no long term contribution to framing the nature of the punishment. Despite the greater precision in the language of 4 Geo I c. 11 in 1717, the implementation of the punishment was left hidden in the language of property in the service of the offender. In effect, through the intermediation of the transportation contractor, a public response to crime in England was met with a private remedy in Virginia. Only the recital to the 1766 statute, 6 Geo III c.32, offered an explanation. This was to the effect that property in his servant's service was the only means by which a master could control his servant in the absence of local judicial or administrative sanction. In a sense this was a re-statement of the Tudor rationale for sending vagabonds home to labour, but it was also to anticipate explanations taken up about the necessity of property in the service of the offender in New South Wales in the 1820s.

The scheme of transportation contained in 4 Geo I c. 11 served Britain well, with few amendments, until the cessation of transportation to America in 1775.<sup>4</sup> The availability of sentences of transportation as a punishment for crimes against property witnessed an immediate uptake of its use, and the development of a profitable industry, aided by government subsidy between 1719 and 1772.<sup>5</sup>

The cessation of transportation in 1775 brought about by the American War of Independence created immediate difficulties in Britain. With transportation to America now blocked, but with sentences to transportation still being handed

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<sup>4</sup> Viscount Beauchamp, 2<sup>nd</sup> Report to the House of Commons, 28 May 1784, *Journal of the House of Commons*, Volume 40, (1784-1786), pp. 1161-2.

<sup>5</sup> Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford, 1987), p. 71.

down by the courts, convicts awaiting transportation were accumulated at an unprecedented rate. Substitute and temporary measures were instituted involving hard labour in the hulks. The hulks maintained the illusion of transportation, but also conflated transportation and hard labour. Hard labour differed from servitude in that the latter was utilised for some private purpose. Labour in the hulks, on the other hand, was for a public benefit. Use of convicts under sentence in military enterprises in Africa never caught on and was only utilised on a small scale, but never so as to frame the punishment of transportation. Even the decision in 1786 to utilise Botany Bay as a destination to which convicts would be sent failed to draw Westminster (and Whitehall) into putting any substance into the nature of transportation. Instead, the use of property in the service of the offender was maintained despite, as Alexander Dalrymple (and other writers) pointed out; there was no available domestic market in New South Wales to utilise the labour of convict servants.<sup>6</sup> In effect a 1597, 1662, and 1717 solution was utilised to resolve a 1787 problem.

In future, convicts were sent outside the jurisdiction of English institutions, where, through the intended assignment of property in the service of the offender, they would be turned into servants of the governor of New South Wales. No law of England in 1787 had this effect. Instead, a private law transaction was necessary to bring about the intended change of status. While attention was paid in Whitehall to gathering the necessary contracts and securities, no attempt seems to have been made to prepare forms of assignments. Governor Phillip had been

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<sup>6</sup> Alexander Dalrymple and George. Mackaness, *Alexander Dalrymple's "a Serious Admonition to the Public on the Intended Thief Colony of Botany Bay"; with a Memoir* (Sydney, 1979), p. 75. HV Evatt, 'The Legal Foundations of New South Wales', *Australian Law Journal*, 11 (1938), pp. 409-438, at p. 411.

given instructions to take the servitude of the convicts, which he could not do, and then to deploy the convicts to produce materials for the common stock, which, in part, he did. Phillip put the convicts into public works, inevitable in the circumstances, before tentatively starting the process of allocating convicts to work as servants for the officers.<sup>7</sup>

Between 1789 and 1824, largely through the auspices of Thomas Shelton of the Old Bailey, elaborate procedures were developed in order to ensure that property in the service of transported convicts was assigned to the governor of New South Wales. As both Jeremy Bentham in London in 1802 and Sir Francis Forbes in 1837 pointed out, without an assignment of property in the service of the convicts to the governor, the convicts, while banished to New South Wales, were free men.<sup>8</sup>

The administration of transportation to New South Wales from London remained English-centric, so that when, after 1791, convicts arrived in New South Wales from both Ireland and Scotland, legislative mechanisms were not adequate to cover their circumstances, resulting in local law determining the status of the arriving convicts, not the law of the jurisdiction from which they had been transported. The position was rectified in Ireland in 1798, but problems developed with respect to differences in the sentencing practices of the Scottish judges, which cast doubt upon the status of convicts arriving from Scotland. This position was not rectified until 1817.

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<sup>7</sup> Phillip to Sydney, 15 May 1788, *Historical Records of Australia*, (hereinafter *HRA*), Volume 1, pp. 22-3.

<sup>8</sup> Sir Francis Forbes to the House of Commons Select Committee, 14 April 1837, *Report from the Select Committee on Transportation; together with the minutes of evidence, appendix, and index*. House of Commons Parliamentary Papers 1837 (518), Para. 93, pp. 7-8.

The status of convicts transported from Scotland brought back into focus lingering doubts about the whole nature of transportation and the resulting status of a transported convict: what was transportation? Was it mere banishment, or was it banishment coupled with punitive labour? And if punitive labour was an element of the punishment, how was that element supervised; by the government or by settlers in New South Wales? Responses to these questions remained elusive. Instructions issued to the early governors (Phillip to Brisbane in 1821) were vague on the management of convicts, it being supposed that the labour of convicts would be utilised for the common good. From the departure of Governor Phillip in 1792, however, increasing numbers of convicts were assigned to military officers and then civil settlers. These assignments were in sufficient numbers to absorb an increasing number of arriving convicts to the point at which, around 1817-1820, assigned convicts provided the bulk of the manual labour in an increasingly diverse colonial society. Despite misgivings in London about the use of assignment because of the possibility of ill-effects on the convicts wrought by evil masters, assignment remained the backbone of transportation in New South Wales. Justification was found in language reminiscent of the recital to the 1766 legislation that by assigning convicts to settler-masters, the masters were thereby empowered to supervise and administer convicts living outside major towns.<sup>9</sup> In effect then, through the process of assigning property in the service of the offender to settlers, the government was outsourcing both the cost of punishment and the reformation of the convicts.

Under the fifteen-year administration of Earl Bathurst at the War and Colonial Office, a more intrusive approach to the management of convicts in the Australian

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<sup>9</sup> Stephen to Wilmot-Horton, 25 March 1825, 4 *HRA* 1, pp. 6-7-8.



colonies was adopted. Dogged by the question whether the punishment of transportation in its contemporary form provided a sufficient deterrent to crime in Britain, and in the aftermath of the Bigge Report in 1822, London issued ever more detailed instructions as to how convicts should be administered and their labour utilised within the colony. In January 1822 Robert Peel was appointed Secretary of State for the Home Department and embarked upon a reform of the criminal laws in Great Britain. In 1824 he introduced legislation, 5 Geo IV c. 84, which replaced the post 1784 regime. This got rid of the ‘rubbish’ of the pre-1824 documentary assignment processes put in place under Thomas Shelton and replaced them with a simple statutory assignment that made the occasional errors of past years both irrelevant and, in the future, impossible. The reformist intent of Peel’s administration foundered on a drafting difficulty in the legislation, which raised doubts in the minds of the colonial administrators about their powers over the administration of the convict assignment system in both New South Wales and Van Diemen’s Land. At the heart of a protracted legal and administrative dispute was not so much whether property in the service of the offender existed, or what it meant, but what authority was passed on the assignment of a convict from the governor to a settler, and whether an assignment, once made, was revocable at will by the governor.

The dispute was resolved under the auspices of Sir George Murray, the then Secretary of State for War and the Colonies. Murray produced an emphatic opinion from the Law Officers of the Crown to the effect that revocation at will was lawful.<sup>10</sup> At the same time, Murray also produced an explanation, at least from London’s perspective, of what the 1824 legislation had intended. Ignoring

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<sup>10</sup> Murray to Darling, 30 January 1830, 1 *HRA* 15, p. 346.

references to property in the service of the offender, London (seemingly ignoring its own legislative language) argued that, after 1824 transported convicts were, in effect, ‘prisoners of the crown’ and Crown property and their labour could be allocated and withdrawn by the Crown at will.

Peel’s administration also started using a parallel system of transportation after 1823. This maintained the use of hulks in Britain, while also sending offenders to Bermuda and Gibraltar.<sup>11</sup> The rationale behind the use of the hulks, whether in England or abroad, was that a convict sent to a hulk remained in the custody of the hulk overseer and, at the end of the sentence of transportation, was repatriated to England if overseas. In the narrow confines of a hulk, and even its associated land facilities, issues about administration and control of the convicts never arose: in effect, property in the service of an offender in a hulk was neither relevant, nor was it created.

In the face of increasing hostility to the presence of convict labour, transportation to New South Wales ended in 1840, although it continued to Van Diemen’s Land until 1853. But, in one further experiment in the use of transportation associated with property in the service of the offender, the government of Lord John Russell and his Secretary of State for the Colonies, the third Earl Grey, devised a scheme of transportation, which retained the language of property in the service of the convict, but which rendered it obsolete. Under regulations of 1842, convicts sentenced to transportation would first undergo an eighteen month period of penal labour in a British reform prison before being sent to Bermuda or Gibraltar for a further period of labour in the hulks. Only then would they be sent to Van

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<sup>11</sup> The arrangement was set out in the 1823 statute 4 Geo IV. c. 47. This was re-enacted as section XIII of 5 Geo IV c. 84.

Diemen's Land as an exile, with a ticket-of-leave for the unexpired portion of the sentence. Under this arrangement, property in the service of the offender only arose on delivery to Hobart Town and, according to Earl Grey, the arriving convict, having completed a period of penal labour, entered into a state of banishment without labour.<sup>12</sup> This system ended in 1856. Transportation to Western Australia, between 1850 and 1868 was carried out as if Western Australia was a hulk and property in the service of convicts transported ceased to be of relevance.

This thesis has offered an explanation of property in the service of offenders in the context of the variable nature on the punishment of transportation. At different times it meant different things, but generally transformed convicts into servants in such a way as to enable the master to ensure the subordination of the servant. Not until the 1820s did transported convicts cease being servants of the governors of New South Wales and become their prisoners.

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<sup>12</sup> Earl Grey, evidence to House of Commons Select Committee on Transportation in 1856. *First Report from the Select Committee on Transportation; together with minutes of evidence, and Appendix*. House of Commons Parliamentary Papers, 1856 (244), pp. 160, 166.

**Appendix 1:**  
***List of English and British transportation legislation***

	Regnal title	Year	Long Title	Comment
	39 Eliz I, c. 4	1597	Act being for the punishment of rogues, vagabonds and sturdy beggars	See table Poor, Vagabond and Vagrant, and Religious Conformity Legislation 1331-1824 for continuation of this line of legislation
	Ordinance of 4 November 1644	1644	An Ordinance of Lords and Commons in Parliament assembled for the fining and banishment of Edmund Waller Esquire	
	Act of 26 February 1649/50	1649	An Act for removing all Papists, and all Officers and Soldiers of Fortune, and divers other delinquents removed from London and Westminster, and confining them within five miles of their dwellings, and for encouragement of such as discover Priests and Jesuits, their Receivers and Abettors.	
	Act of 9 August 1650	1650	An Act against several Atheistical, Blasphemous and Execrable Opinions, derogatory to the honor of God, and destructive to humane Society	
	Ordinance of 29 June 1654	1654	An Ordinance against Challenges, Duels and all Provocations thereunto	
	Act of 26 June 1657	1657	An Act for attainer of rebels in Ireland	
	Act of 26 June 1657	1657	An Act for the better suppressing of Theft on the Borders of England and Scotland, and for discovery of High-way Men and other Felons	
	14 Car II, c. 1	1662	An act for preventing the mischief and dangers that may arise by certain persons called quakers and others, refusing to take lawful oaths	
	14 Car II, c. 12	1662	The act regarding rogues and vagabonds	
	18 Car II, c. 3	1666	An act to continue the former act preventing the theft and rapine upon the northern borders of England	
	22 Car II, c. 5	1670	An act for taking away the benefit of clergy from such as steal cloth from the rack, and from such as steal or embezzle his Majesty's ammunition and stores	
	22 & 23 Car II,	1670	An act to prevent the malicious	

	Regnal title	Year	Long Title	Comment
	c. 7		burning of houses, stacks of corn and hay, and killing and maiming cattle	
	31 Car II c. 2	1679	An Act for the better securing the Liberty of the subject and for the Prevention of Imprisonment beyond the Seas (Habeas Corpus)	
	4 Geo I, c. 11	1717	An Act for the further preventing Robbery, Burglary and other Felonies, and for the more effectual Transportation of Felons, and unlawful Exporters of Wool; and for declaring the Law upon some Points relating to Pirates	That portion which relates to contracts, security and punishment for early return etc., repealed by 5 Geo IV, c. 84 Great want of servants making colonies and plantations more useful to this nation Persons convicted of offences within the benefit of clergy to be transported for 7 years Contractor to have property and interest in service of offender for term of years Idle persons between 15 and 21 Not extend to Scotland
	6 Geo I, c. 23	1719	An Act for the further preventing Robbery, Burglary, and other Felonies, and for the more effectual Transportation of Felons	That portion which relates to contracts, security and punishment for early return etc., repealed by 5 Geo IV, c. 84 Two justices empowered to enter into transportation contracts Charges to be borne by the local county, etc. Security to be in the name of the clerk who can enforce in his own name Transport contractors can secure felons “as they shall think fit.”
	7 Geo II, c. 21	1733	An Act for the more effectual Punishment of Assaults with Intent to commit Robbery	Not a transportation statute but an example of punishment being extended
	16 Geo II, c. 15	1743	An Act for the more easy and effectual Conviction of Offenders found at large within the Kingdom of <i>Great Britain</i> , after they have been ordered for Transportation.	Repealed by 5 Geo IV, c. 84
	20 Geo II, c. 47	1747	An Act to prevent the Return of such Rebels and Traitors concerned in the late Rebellion, as have been or shall be pardoned on Condition of Transportation; and also the hinder their going into the Enemies Country	
	6 Geo III, c. 32	1766	An Act to extend an Act made in the Fourth Year of the Reign of King <i>George</i> the First, intituled, <i>An Act for the further preventing Robbery, Burglary, and other</i>	

	Regnal title	Year	Long Title	Comment
			<i>Felonies, and for the more effectual Transportation of Felons and unlawful Exporters of Wool, and for declaring the Law upon some Points relative to Pirates, to that Part of Great Britain called Scotland, so far as the said Act relates to the more effectual Transportation of Felons; and for amending and rendering more effectual the Laws for restraining Muirburn, in forbidden Time, in that Part of the United Kingdom.</i>	
	8 Geo III, c. 15	1768	An Act for the more speedy and effectual Transportation of Offenders.	Repealed by 5 Geo IV, c. 84 Judge may make orders for immediate transportation Transfer to contractor with property in the service of the offender etc
	16 Geo III, c. 43	1776	An Act to authorise, for a limited Time, the Punishment by Hard Labour of Offenders who, for certain Crimes, are or shall become liable to be transported to any of his Majesty's Colonies and Plantations.	Applied to England Hard labour on the Thames etc. In force for 2+ years Extended by 18 Geo III, c. 62 Extended again by 19 Geo III, c. 54
	18 Geo III, c. 62	1778	An Act to continue an Act, made in the sixteenth Year of his present Majesty, intituled, <i>An Act to authorize, for a limited Time, the Punishment, by hard Labour, of Offenders, who, for certain Crimes, are or shall become liable to be transported to any of his Majesty's Colonies and Plantations</i> . [Continued till June 1, 1779.]	Extended previous act
	19 Geo III, c. 54	1779	An Act for further continuing, for a limited Time, an Act, made in the sixteenth Year of the Reign of his present Majesty, intituled, <i>An Act to authorise, for a limited Time, the Punishment, by Hard Labour, of Offenders who, for certain Crimes, are or shall become liable to be transported to any of his Majesty's Colonies and Plantations</i> . [Further continued to July 1, 1779.]	Ditto
	19 Geo III, c. 74	1779	An Act to explain and amend the Laws relating to the Transportation, Imprisonment, and other Punishment, of certain Offenders.	Applied to England and Wales The Penitentiary Act – query To end 1 June 1784+ Transportation to Americas or elsewhere Alternatives to branding, whipping, etc Penitentiary houses to be built

	Regnal title	Year	Long Title	Comment
				<p>Principally about penitentiaries</p> <p>2 acts: 16 Geo 3, c. 43 and 19 Geo 3, c. 7 (same session)</p> <p>extended</p> <p>Extended to 1 June 1787+ by 24 Geo III, c. 56</p> <p>Extended to 1 June 1793+ by 28 Geo III, c. 24</p> <p>Extended to 1 June 1799+ by 34 Geo III, c. 60</p> <p>Extended to 25 March 1802+ by 39 Geo III, c. 51</p> <p>Extended to 25 March 1805+ by 42 Geo III, c. 28</p> <p>Extended to 25 March 1813 by 46 Geo III, c. 28</p> <p>Extended to 25 March 1814 by 53 Geo III, c. 36</p> <p>Extended to 25 March 1815 by 54 Geo III, c. 30</p> <p>Extended to 1 May 1821 by 56 Geo III, c. 27</p>
	24 Geo III, c. 12	1783	An Act to authorise the Removal of Prisoners in certain Cases; and to amend the Laws respecting the Transportation of Offenders.	<p>Applied to England &amp; Wales</p> <p>Hulks Act</p> <p>Prisoners may be sent to hulks</p> <p>Authority for courts to contract for transportation</p> <p>Costs of administering this act to be paid by Parliament</p> <p>Repealed by 24 Geo III, c. 56</p>
	24 Geo III, c. 56	1784	An Act for the effectual Transportation of Felons and other Offenders; and to authorise the Removal of Prisoners in certain Cases; and for other Purposes therein mentioned.	<p>Applied to England &amp; Wales</p> <p>Restated transportation and hulks measures</p> <p>HM in Council may appoint places beyond the seas to which felons may be sent wither within dominions or beyond</p> <p>Repeated processes from 1767 Act</p> <p>Gaolers and overseers powers set out</p> <p>Ss 17 and 18 repealed earlier Acts</p> <p>Extended 19 Geo III, c. 74 to 1 June 1787+</p> <p>Extended to 1 June 1793+ by 28 Geo III, c. 24</p> <p>Extended to 1 June 1799+ by 34 Geo III, c. 60</p> <p>Extended to 25 March 1802+ by 39 Geo III, c. 51</p> <p>Extended to 25 March 1805+ by 42 Geo III, c. 28</p> <p>Extended to 25 March 1813 by 46 Geo III, c. 28</p> <p>Extended to 25 March 1814 by 53 Geo III, c. 39</p>

	Regnal title	Year	Long Title	Comment
				Extended to 25 March 1815 by 54 Geo III, c. 30 Repealed by 55 Geo III, c. 156
	25 Geo III, c. 46	1785	An Act for the more effectual Transportation of Felons, and other Offenders, in that Part of <i>Great Britain</i> called <i>Scotland</i> , and to authorise the Removal of Prisoners in certain Cases.	Extends 24 Geo 3, c.56 to Scotland Repeats mechanics Comparable provisions to 24 Geo III, c. 56 Extended until 1 June 1799+ by 34 Geo III, c. 60 Extended to 25 March 1802+ by 39 Geo III, c 51 Extended to 25 March 1805+ by 42 Geo III, c. 28 Extended to 25 March 1813 by 46 Geo III, c. 28 Extended to 25 March 1814 by 53 Geo III, c. 39 Extended to 1 May 1821 by 56 Geo III, c. 27 Extended to 21 March 1823 by 1 & 2 Geo IV, c. 6
	27 Geo III, c. 2	1787	An Act to enable his Majesty to establish a Court of Criminal Judicature on the Eastern Coast of <i>New South Wales</i> , and the Parts adjacent.	Establishing a Court of Criminal Judicature in New South Wales
	28 Geo III, c. 24	1788	An Act to continue several Laws relating to the granting a Bounty on the Exportation of certain Species of <i>British</i> and <i>Irish</i> Linens exported, and taking off the Duties on the Importation of foreign Raw Linen Yarns made of Flax; and to the preventing the committing of Frauds by Bankrupts; and for continuing and amending several Laws relating to the Imprisonment and Transportation of Offenders.	Extended 19 Geo III, c. 74 and 24 Geo III, c. 56 until 1 June 1793+ Extended to 21 March 1823 by 1 & 2 Geo IV, c. 6 Nomination of preferred contracting agent That portion re transportation repealed by 5 Geo IV, c. 84
	30 Geo III, c. 47	1790	An Act for enabling his Majesty to authorize his Governor or Lieutenant Governor of such Places beyond the Seas, to which Felons or other Offenders may be transported, to remit the Sentences of such Offenders.	Colonial governors may remit sentences Remit ASAP to Secty. of State for inclusion in next General Pardon under the Great Seal
	31 Geo III, c. 46	1791	An Act for the better regulating of Gaols, and other Places of Confinement.	That portion re hard labour for prisoners awaiting transportation repealed by 5 Geo IV, c. 84
	34 Geo III, c. 45	1794	An Act to enable his Majesty to establish a Court of Criminal Judicature in <i>Norfolk Island</i> .	
	34 Geo III, c. 60	1794	An Act to continue so much of several Laws, respecting the Transportation and Imprisonment	Extended 19 Geo III, c. 74 and 24 Geo III, c. 56 until 1 June 1799+



	Regnal title	Year	Long Title	Comment
			of Offenders, as relates to the Removal of Offenders to temporary Places of Confinement.	Extended 25 Geo III, c. 46 until 1 June 1799+
	34 Geo III, c. 84	1794	An Act for erecting a Penitentiary House or Houses for confining and employing Convicts.	
	39 Geo III, c.51	1799	An Act for continuing, until the twenty-fifth Day of <i>March</i> one thousand eight hundred and two, several Laws relating to the Transportation of Felons and other Offenders, and to the authorizing the Removal of Offenders to temporary Places of Confinement in <i>England</i> and <i>Scotland</i> respectively.	Extended 19 Geo III, c. 74, 24 Geo III, c. 56 and 25 Geo III, c. 46 until 25 March 1802
	39 Geo III, c. 52	1799	An Act for continuing, until the twenty-fifth Day of <i>March</i> one thousand eight hundred and two, so much of an Act, made in the nineteenth Year of the Reign of His present Majesty, Chapter Seventy-four, <i>videlicet</i> , on the twenty-sixth Day of <i>November</i> one thousand seven hundred and seventy-eight, intituled, <i>An Act to explain and amend the Laws relating to the Transportation, Imprisonment, and other Punishment of certain Offenders</i> , as relates to Penitentiary Houses.	Extended Penitentiary provisions of 19 Geo III, c. 74 to 25 March 1802 (not cross referenced above)
	42 Geo III, c. 28	1802	An Act for continuing until the twenty-fifth Day of <i>March</i> One thousand eight hundred and five, and from thence to the End of the then next Session of Parliament, and amending, several Laws relating to the Transportation of Felons, and other Offenders, to temporary Places of Confinement in <i>England</i> and <i>Scotland</i> respectively.	Extended 19 Geo III, c. 74, 24 Geo III, c. 56 and 25 Geo III, c. 46 until 25 March 1805
	43 Geo III, c. 15	1802	An Act to facilitate, and render more easy, the Transportation of Offenders.	King may give property in service of offenders! Extended to 21 March 1823 by 1 & 2 Geo IV, c. 6 Repealed by 5 Geo IV, c. 84
	46 Geo III, c. 28	1806	An Act to continue, until the Twenty-fifth Day of <i>March</i> One thousand eight hundred and thirteen, several Laws relating to the Transportation of Felons and other Offenders, * to temporary Places of Confinement in <i>England</i> and <i>Scotland</i> .	Extended 19 Geo III, c. 74, 24 Geo III, c. 56 and 25 Geo III, c. 46 until 25 March 1813
	53 Geo III, c. 39	1813	An Act to continue, until the Twenty fifth Day of <i>March</i> One	

	Regnal title	Year	Long Title	Comment
			thousand eight hundred and fourteen, several Laws relating to the Transportation of Felons and other Offenders to temporary Places of Confinement in <i>England and Scotland</i>	
	54 Geo III, c. 30	1813	An Act to continue until the Twenty fifth Day of <i>March</i> One thousand eight hundred and fifteen, and from thence to the End of the then next Session of Parliament, several Laws relating to the Transportation of Felons and other Offenders, and to the authorizing the Removal of Offenders to temporary Places of Confinement in <i>England and Scotland</i>	
	55 Geo III, c. 156	1815	An Act to amend the Laws relative to the Transportation of Offenders; to continue in force until the First Day of <i>May</i> One thousand eight hundred and sixteen.	<p>Repealed 24 Geo III, c. 56  Restated transportation framework with regard to England and Wales</p> <ul style="list-style-type: none"> <li>• In effect a consolidated Transportation Act</li> <li>• Note that security not just from contactor but also from assignees!</li> </ul> <p>To continue in force until 1 May 1816 and no longer  [What happened to 25 Geo III, c. 46 and Scotland?]</p>
	56 Geo III, c. 27	1816	An Act to amend several Laws relative to the Transportation of Offenders; to continue in force until the First Day of <i>May</i> One thousand eight hundred and twenty one.	<p>Extended 55 Geo III, c. 156 until 1 May 1821  Extended 19 Geo III, c. 74 and 25 Geo III, c. 46 until 1 May 1821 and no longer  Extended to 21 March 1823 by 1 &amp; 2 Geo IV, c. 6</p>
	59 Geo III, c. 101	1819	An Act to enlarge the Powers of an Act passed in the Fifty sixth Year of His present Majesty, relative to the Transportation of Offenders, to continue until the First Day of <i>May</i> One thousand eight hundred and twenty one.	Extended to 21 March 1823 by 1 & 2 Geo IV, c. 6
	1 & 2 Geo IV, c. 6	1821	An Act to continue for Two Years from the passing thereof, to the End of the then next Session of Parliament, the several Acts for the Transportation of Offenders from <i>Great Britain</i>	Extended until 21 March 1823 the following acts: 56 Geo III, c. 27, 59 Geo III, c. 101, 43 Geo III, c. 15, 25 Geo III, c. 46 and 28 Geo III, c. 24
	4 Geo IV, c. 47	1823	An Act for authorizing the Employment at Labour, in the Colonies, of Male Convicts under Sentence of Transportation.	Authorised deployment of convicts awaiting transportation To remain in force alongside 56 Geo III, c. 27.
	4 Geo IV, c. 48	1823	An Act for enabling Courts to abstain from pronouncing	

	Regnal title	Year	Long Title	Comment
			Sentence of Death in certain Capital Felonies	
	4 Geo IV, c. 96	1823	An Act to provide, until the First Day of <i>July</i> One thousand eight hundred and twenty seven, and until the End of the next Session of Parliament, for the better Administration of Justice in <i>New South Wales</i> and <i>Van Diemen's Land</i> , and for the more effectual Government thereof; and for other Purposes relating thereto.	All instruments whereby the governors of New South Wales have remitted the term of transportation to have the same effect as pardons under the Great Seal How pardons to take effect Sec. 36 persons under sentence of transportation can be punished for further offences committed in the colonies Sec. 44 HM may erect Van Diemen's Land into a separate colony
	5 Geo IV, c. 84	1824	An Act for the Transportation of Offenders from <i>Great Britain</i> .	Recognises imminent expiry of other acts – this act commences from last day of present session – all punishments to continue under this act Sec. 2 HM may appoint places of transportation and Secty. Of State may “authorize and empower some Person to make a Contract for their effectual Transportation ...” and direct that security be taken. Punishment for offenders during transportation Sec. 7 if transportation in one of HM’s ships nominated custodian Sec. 8 “As soon as offender delivered to Governor, etc. “the Property in the Service of such Offender shall be vested in the Governor ... and it shall be lawful for the Governor ... whenever he shall think fit... to assign any such offender to any other person for the then residue of his ... term ... and for such Assignee to assign over such Offender, and so often as may be thought fit; and the Property in the Service of such Offender shall continue in the Governor ... or his assigns. Sec. 9 royal prerogative Provisions for care and maintenance of prisoners Sec. 22 prisoners unlawfully at large to suffer death Sec. 24 Clerk of courts to give certificate of indictment and convictions

	Regnal title	Year	Long Title	Comment
				Sec. 25 Felons under punishment but remitted may sue for real or personal property Repealed the following statutes: 4 Geo I, c. 11, re contracts, security and punishment for returning 6 Geo I, c. 23 re ditto 16 Geo II, c. 15 8 Geo III, c. 15 28 Geo III, c. 24 re transportation 31 Geo III, c. 46 re hard labour for prisoners awaiting transportation 43 Geo III, c. 15.
	6 Geo IV, c. 69	1825	An Act for punishing Offences committed by Transports kept to labour in the Colonies: and better regulating the Powers of Justices of the Peace in <i>New South Wales</i>	Offences committed by Male offenders in any part of HM's Dominions shall be attended with the same punishments as if committed in England Not extended to NSW of VDL
	6 & 7 Geo IV, c. 28	1827	An Act for further improving the Administration of Justice in Criminal Cases in England	
	7 & 8 Geo IV, c. 63	1827	An Act to explain so much of an Act of the present Session of Parliament, for punishing Mutiny and Desertion, as relates to the Transportation of Offenders	Mechanics for transporting mutinous soldiers in the absence of a Commander in Chief
	7 & 8 Geo IV, c. 73	1827	An Act to continue until (31 December 1829), an Act (4 Geo 4, c. 96) for the better Administration of Justice in <i>New South Wales</i> and <i>Van Diemen's Land</i>	
	9 Geo IV, c. 83	1828	An Act to provide for the Administration of Justice in <i>New South Wales</i> and <i>Van Diemen's Land</i> , and for the more effectual Government thereof, and for other Purposes relating thereto.	Sec. 9 addresses Governor's powers of assignment
	1 Wm IV, c. 39	1830	An Act to amend an Act passed in the Fifth Year of His present Majesty ( 5 Geo IV, c. 84), for the Transportation of Offenders from <i>Great Britain</i> ; and for punishing Offences committed by Transports kept to labour in the Colonies.	Permitted inter-colonial transfers
	2 & 3 Wm IV, c. 62	1832	An Act for Abolishing the Punishment of Death in certain Cases, and substituting a lesser Punishment in lieu thereof	Se. 2 limited the time a Governor/Lieut. Governor may grant pardons or tickets of leave 7 – 4, 14 – 8 & no property holding No restraint on royal prerogative

	Regnal title	Year	Long Title	Comment
	4 & 5 Wm IV, c. 67	1834	An Act for abolishing Capital Punishment in case of returning from Transportation	So much of 5 Geo 4, c. 84 as inflicts punishment of death for returning from transportation repealed – transportation instead
	1 Vict, c. 90	1837	An Act to amend the Law relative to Offences punishable by Transportation for Life	
	6 & 7 Vict, c. 7	1843	An Act to amend the Law affecting transported Convicts with respect to Pardons and Tickets of Leave	Repealed 2 & 3 Will, c. 62 Control of granting absolute or conditional pardons remitted to London Holders of Tickets of Leave may sue but can't hold real property Effective 6 weeks after receipt in the colony
	9 & 10 Vict, c. 26	1846	An Act for abolishing the Office of Superintendent of Convicts under Sentence of Transportation	
	16 & 17 Vict, c. 99	1853	An Act to substitute, in certain Cases, other Punishment in lieu of Transportation	No person to be transported except for life or 14 years
	16 & 17 Vict, c. 121	1853	An Act for providing Places of Confinement in <i>England</i> or <i>Wales</i> for Female Offenders under Sentence or Order of Transportation	
	20 & 21 Vict, c. 3	1857	An Act to amend the Act (16 & 17 Vict, c. 99), to substitute in certain Cases other Punishment in lieu of Transportation	
	27 & 28 Vict, c. 47	1864	An Act to amend the Penal Servitude Acts	
	28 & 29 Vict, c. 126	1865	An Act to consolidate and amend the Law relating to Prisons	
	40 & 41 Vict, c. 21	1877	Prisons Act 1877	
	54 & 55 Vict, c. 69	1891	An Act to amend the Law relating to Penal Servitude and the Prevention of Crime	
	61 & 62 Vict, c. 41	1898	An Act to amend the Prisons Act	
	16 & 17 Geo V, c. 58	1926	Penal Servitude Act, 1926	
	8 Geo 4, No. 4 VDL	1827	<i>An Act for the Transportation of Offenders from Van Diemen's Land</i>	
	11 Geo 4. No. 12 NSW	1830	<i>An act for the Punishment and Transportation of Offenders in New South Wales</i>	

**Appendix 2:**  
***List of Poor, Vagabond and Religious conformity legislation***  
**1331-1824**

	Regnal Title	Year	Name of Act	Commencement & Duration
1.	13 Edw I c. 1-6	1285	Statute of Winchester	
2.	5 Edw III c. 14	1331	Arrest of night walkers and others suspected	
3.	23 Edw III c. 7	1349	No person shall give anything to a beggar that is able to labour	
4.	23 Edw III c.1	1351	Statute of Labourers	
5.	7 Ric II c. 5	1383	Justices empowered to bind over vagabonds to their good behaviour	
6.	12 Ric II c. 7	1388	Punishment of Beggars, &c.	
7.	11 Hen VII c. 2	1495	An Act against Vagabonds and Beggars	
8.	19 Hen VII c. 12	1503	An Act touching the punishment of Vagabonds	
9.	22 Hen VIII c. 12	1530	An Act concerning the punishment of Beggars and Vagabonds	To endure until the last day of the next parliament
10.	27 Hen VIII c. 25	1536	An Act for the punishment of sturdy vagabonds and Beggars	Until the last day of the next parliament
11.	28 Hen VIII c. 6	1536	An Act for the continuing of the Statutes for Beggars and Vagabonds, etc. Continued: 22 Hen VIII c. 12	Until the last day of the next parliament
12.	31 Hen VIII c. 7	1539	An Act for Beggars and Vagabonds Continued: 22 Hen VIII c. 12 and (per margin note 27 Hen VIII c. 25)	Until the last day of the next parliament
13.	33 Hen VIII c. 17	1541	An Act for continuance and confirmation of certain Acts Continued: 22 Hen VIII c. 12	Until the last day of the next parliament
14.	37 Hen VIII c. 23	1545	An Act for continuance and confirmation of certain Acts Continued: 22 Hen VIII c. 12	Until the last day of the next parliament
15.	1 Edw VI c. 3	1547	An Act for the Punishment of Vagabonds and for the Relief of the poor and impotent Persons Repealed: all former acts against vagabonds	To endure unto the end of the next parliament
16.	3 & 4 Edw VI c. 16	1549	An Act touching the punishment of Vagabonds and other idle Persons Repealed 1 Edw VI c. 3 and revived 22 Hen VIII c. 12 (to remain a perfect act forever) But Sec. IX suggests all prior acts	

	Regnal Title	Year	Name of Act	Commencement & Duration
			repealed.	
17	5 & 6 Edw VI c. 2	1551	For the Provision and Relief of the Poor Confirmed 22 Hen VIII c. 12 and 3 & 4 Edw VI c. 16	
18	7 Edw VI c. 11	1553	An Act for the continuance of certain Statutes Continued 5 & 6 Edw VI c. 2	Until the last day of the next parliament
19	1 Mar s2 c. 13	1553	An Act for the continuance of certain Statutes Continued: 5 & 6 Edw VI c. 2; 7 Edw VI c. 11	Until the last day of the next parliament
20	2 & 3 P & M c. 5	1555	An Act for the Relief of the Poor Confirmed 22 Hen VIII c. 12 & 3 & 4 Edw VI c. 16 as amended by this act	Until the end of first session of the next parliament
21	4 & 5 P & M c. 9	1557	An Act for the continuation of certain Statutes Continued 2 & 3 P & M c. 5	Until the last day of the next parliament
22	1 Eliz I c. 18	1558	An Act for the continuation of certain Statutes Continued 2 & 3 P & M c. 5	Until the last day of the next parliament
23	5 Eliz I c. 3	1562	An Act for the Relief of the Poor Confirmed 22 Hen VIII c. 12 and 3 & 4 Edw VI c. 16 as to the relief of the poor, as amended	Until the end of first session of the next parliament
24	5 Eliz I c. 4	1562	Statute of Artificers	
25	13 Eliz I c. 25	1571	An Act for the reviving and continuance of certain Statutes Revived 5 Eliz I c. 3 and continued	Until the end of the next parliament
26	14 Eliz I c. 5	1572	An Act for the Punishment of Vagabonds, and for the Relief of the Poor and Impotent Repealed 22 Hen VIII c. 12, 3 & 4 Edw VI c. 16, and 5 Eliz I c. 3	Endure for 7 years and then to the end of the parliament next following
27	18 Eliz I c. 3	1575	An Act for the setting of the Poor on Work, and for the avoiding of Idleness Amended 14 Eliz I c. 5	Both acts to run for 7 years from the end of the present session and then to the end of the next parliament following
28	27 Eliz I c. 11	1584	An Act for the reviving continuance explanation and perfecting of divers Statutes	To continue to the end of the next parliamentary next ensuing
29	29 Eliz I c. 5	1586	An Act for the Continuance and perfecting of diverse Statutes Continued 14 Eliz I c. 5 and 18 Eliz I c. 3	Continued and endure in full force and effect til the end of the next parliament
30	31 Eliz I c. 10	1588	An Act for the Continuance and perfecting of diverse Statutes Continued 14 Eliz I c. 5 and 18 Eliz I c.	Continued and endure in full force and effect til the end of the next parliament

	Regnal Title	Year	Name of Act	Commencement & Duration
			3	
31.	35 Eliz I c. 1	1592	An Act to Retain the Queen's Subjects in Obedience Punishment of people refusing to attend church to abjure the realm – the Conventicle Act	To continue no longer than to the end of the next session of parliament
32.	35 Eliz I c. 2	1592	An Act against Popish Recusants	None mentioned
33.	35 Eliz I c. 7	1592	An Act for continuation of diverse Statutes Continued 14 Eliz I c. 5 and 18 Eliz I c. 3 Amended penalties under both acts. Revived punishment of vagabonds from 22 Hen VIII c. 12 and see sec IX re land use for the poor	To continue and endure until the end of the parliament next ensuing
34.	39 Eliz I c. 3	1597	An Act for the Relief of the Poor	No longer than the end of the next Session of Parliament
35.	39 Eliz I c. 4	1597	An Act for punishment of Rogues, Vagabonds, and Sturdy Beggars 'all Statutes heretofore made for the punishment of Rogues Vagabonds or Sturdy Beggars, or for the erection or maintenance of Houses of Correction, or touching the same, shall for so much as connecteth the same be utterly repealed'	This Act to endure to the end of the first Session of the next Parliament Repealed by 13 Ann c. 26
36.	39 Eliz I c. 5	1597	An Act for erecting of Hospitals or abiding and working Houses for the Poor Extended operation of 35 Eliz I c. 7 re maimed soldiers	
37.	39 Eliz I c. 17	1597	? An Act against lewde and wandering persons pretending themselves to be Souldiers and Marriners	Extended by 43 Eliz I c. 9 until the end of the first session of the next parliament
38.	39 Eliz I c. 18	1597	An Act for the reviving continuance explanation perfecting and repealing of diverse Statutes Extended operation of 14 Eliz I c. 5 and 18 Eliz I c. 3	To continue until the end of the next parliament
39.	43 Eliz I c. 2	1601	An Act for the relief of the Poor 39 Eliz I c. 3 to remain in force until commencement of this Act	From next Easter To endure no longer than the end of the next session of parliament
40.	43 Eliz I c. 9	1601	An Act for Continuance of divers Statutes, and for Repeal of some others Continued the operation of 39 Eliz I c. 4 and 39 Eliz I c. 3	shalbe continued and remaine in force untill the ende of the firste Session of the next Parliamente
41.	1 Jac I c. 7	1603	An Act for the Continuance and Explanation of the Statute made in the thirty-ninth Year of the Reign of the late Queen <i>Elizabeth</i> , intituled, An Act for Punishment of Rogues, Vagabonds and Sturdy Beggars.	<del>This present Act shall continue but until the end of the next Parliament. 39 Eliz I c. 4 shall continue and stand in force so long as this present Act shall be and remain in force and strength.</del> Repealed by 13 Ann c. 26



	Regnal Title	Year	Name of Act	Commencement & Duration
42.	1 Jac I c. 25	1603	An Act for continuing and reviving of divers Statutes, and for repealing of some others	
43.	7 Jac I c. 4	1609	An Act for the due Execution of divers Laws and Statutes heretofore made against Rogues, Vagabonds and sturdy Beggars, and other lewd and idle Persons	This Act to have Continuance for the Space of seven Years, and from thence to the End of the next Session of Parliament after the said seven Years  Repealed by 13 Ann c. 26
44.	21 Jac I c. 28	1623	An Act for continuing and reviving of divers Statutes, and Repeal of divers others	<i>The 58 Statutes above-mentioned continued until the next Parliament.</i> Repealed: 7 Ric II c. 5 23 Edw III c. 7 11 Hen VII c. 2 19 Hen VII c. 12 22 Hen VIII c. 12, and 3 & 4 Edw VI c. 16
45.	3 Car I c. 5	1627	An Act for Continuance and Repeal of divers Statutes	Listed acts to continue until the end of the first session of the next parliament
46.	Ordinance of 8 April 1644	1644	An Ordinance for the better observation of the Lords-Day	
47.	Ordinance of 11 February 1647	1647	An Ordinance for the utter suppression and abolishing of all Stage-plays and Interludes, etc	
48.	Act of 26 Feb 1649	1649	An Act for removing all Papists, and other offenders and Soldiers of Fortune, etc.	
49.	Act of 7 May 1649	1649	An Act for the Relief and Imployment of the Poor, and the punishment of Vagrants, and other disorderly persons, within the City of London, and the Liberties thereof	
50.	Act of 9 August 1650	1650	An Act against several Atheistical, Blasphemous and Execrable Opinions, derogatory to the honor of God, and destructive of humane Society	
51.	Act of 9 June 1657	1657	An Act against Vagrants and wandring, idle dissolute persons	
52.	Act of 26 June 1657	1657	An Act for the Attainder of the Rebels in Ireland	
53.	Act of 26 June 1657	1657	An Act for the better suppressing of Theft upon the Borders of England and Scotland, and for discovery of High-way Men and other Felons	

	Regnal Title	Year	Name of Act	Commencement & Duration
54.	14 Car II c. 1	1662	An Act for preventing the Mischiefs and Dangers that may arise by certain Persons called Quakers refusing to take lawful Oaths	
55.	14 Car II c. 12	1662	An Act for the better Reliefe of the Poore of this Kingdom	shall extend and be in Force until the nine and twentieth Day of <i>May</i> one thousand six hundred sixty five, and the End of the first Session of the next Parliament then next ensuing, and no longer
56.	14 Car II c. 22	1662	An Act for preventing of Theft and Rapine upon the Northern Borders of England Revived 4 Jac I c. 1 and 7 Jac I c. 1 [concerned with cross border trial processes]	To be in force for Five years and no longer
57.	16 Car II c. 4	1664	An Act to prevent and suppress seditious Conventicles	To continue on force for three years after the end of this present session of parliament and from thence forward to the end of the next session of parliament after the said three years and no longer
58.	18 & 19 Car II c. 3	1666	An Act to continue a former Act for preventing of Theft and Rapine upon the Northern Borders of England	
59.	22 Car II c. 5	1670	An Act for takeing away the Benefitt of Clergy from such as steale Cloth from the Racke and from such as shall steale or imbezill his Majestys Ammunition and Stores	
60.	22 & 23 Car II c. 7	1670	An Act to prevent the malicious burning of Houses, Stackes of Corne and Hay and killing or maiming of Catle	
61.	29 & 30 Car II c. 2	1677	An Act for continuance of Two former Acts for preventing of Theft and Rapine upon the Northern Borders of England Extended 14 Car II c. 22 and 18 & 19 Car II c. 3	The two former Act shall remain in full force from henceforth for seven years and also from thence until the end of the first session of the next parliament
62.	31 Car II c. 2	1679	An Act for the better securing the Liberty of the Subject and for the Prevention of Imprisonment beyond the Seas (Habeas Corpus)	
63.	1 Jac II c. 14	1685	An Act for Continuance of Three former Acts for Preventing of Theft and Rapine upon the Northern Borders of England Extended 14 Car II c. 22, 18 & 19 Car II c. 3 and 29 & 30 Car II c. 2	The three Acts shall remain in force from henceforth and for and during the space of eleven years and then the the end of the first session of the next parliament
64.	1 Jac II c. 17	1685	An Act for Reviving and Continuance of severall Acts of Parlyament therein mentioned 14 Car II c. 12 revived for 7 years;	
65.	3 W & M c. 11	1691	An Act for the better Explanation and supplying the Defects of the former	

	Regnal Title	Year	Name of Act	Commencement & Duration
			Laws for the Settlement of the Poor	
66	4 W & M c. 24	1692	An Act reviving continuing and explaining several Laws therein mentioned that are expired and near expiring	
67	7 & 8 Wil III c. 17	1695	An Act to continue Four formers Acts for preventing Theft and Rapine upon the Northern Borders of England Extended 14 Car II c. 22, 18 & 19 Car II c. 3, 29 & 30 Car II c. 2 and 1 Jac II c. 14	The four former Acts shall remain in full force from henceforth for five years and then until the end of the first session of the next parliament
68	8 & 9 Wil III c. 30	1696	An Act for supplying some Defects in the Laws for the Relief of the Poor of this Kingdom	
69	11 Wm III c. 13	1698	An Act for continuing several Laws therein mentioned Extended 14 Car II c. 12, 1 Jac II c. 17, 3 W & M c. 11 and 4 W & M c. 24	Former statutes shall continue and be in force for and during the space of Seven Years from 29 September 1700 and thence until the end of the next session of parliament
70	11 Wm III c. 18	1698	An Act for the more effectual Punishment of Vagrants and sending them whither by Law they ought to be sent	3 years from 24 June 1700 and then to the end of the next session
71	12 & 13 Wm III c. 6	1700	An Act for continuing the Acts therein mentioned for preventing Theft and Rapine upon the Northern Borders of England Continued: 14 Car II c. 22, 18 & 19 Car II c. 3, 29 & 30 Car II c. 2, 1 Jac II c. 14, and 7 & 8 Wm III c. 17	To continue in full force from the expiration of the last mentioned Act and during the space of Eleven years and from thence to the end of the first session of the next parliament.
72	1 Anne c. 13	1702	An Act for continuing ... and for reviving and making more effective an Act relating to Vagrants	
73	2 & 3 Anne c. 6	1703	An Act for the Encrease of Seamen and better Encouragement of Navigation ad Security of the Coal Trade	
74	4 & 5 Anne c. 6	1706	An Act for the Encouragement an Encrease of Seamen and for the better and speedier Manning Her Majesties Fleet	
75	6 Anne c. 32	1706	An Act for the Continuance of the Laws for the Punishment of Vagrants and for making such Laws more effectual	
76	6 Anne c. 34	1706	An Act for continuing the Laws therein mentioned relating to the Poor and the buying and settling of Cattle in Smithfield and for the suppressing of Piracy	
77	12 Anne c. 10	1712	An Act for continuing the Acts therein mentioned for preventing Theft and Rapine upon the Northern Borders of England Continued: 14 Car II c. 22, 18 & 19 Car	Shall continue and be in full force from and after the expiration of the said Act made in the 12 & 13 year of Wil III for and during Eleven years and thence to the end of the next

	Regnal Title	Year	Name of Act	Commencement & Duration
			II c. 3, 29 & 30 Car II c. 2, 1 Jac II c. 14, 7 & 8 Wm III c. 17, and 12 & 13 Wm III c. 6	parliament and no longer.
78.	12 Anne c. 18	1712	An Act for making perpetual the Act made [14 Car II c. 12] and that persons bound Apprentices to or being hired Servants etc.	Repealed by 13 Geo II c. 24 and 'all the Acts therein mentioned to be repealed, are hereby declared to be and continue repealed.
79.	13 Anne c. 26	1713	An Act for reducing the Laws relating to Rogues, Vagabonds, Sturdy Beggars and Vagrants, into one Act of Parliament; and for the more effectual punishing such Rogues, Vagabonds, Sturdy Beggars and Vagrants, and sending them whither they ought to be sent Repealed: 39 Eliz I c. 4, 1 Jac I c. 7, and 7Jac I c. 4 repealed	
80.	10 Geo II c. 28	1737	An Act to explain and amend so much of an act made in the [12 <sup>th</sup> ] year of the reign of Queen Anne, An act for reducing the laws relating to rogues, vagabonds, sturdy beggars and vagrants, into one act of parliament; and for the more effectual punishing such Rogues, Vagabonds, Sturdy Beggars and Vagrants, and sending them whither they ought to be sent, as relates to common players of interludes	
81.	13 Geo II c. 24	1740	An Act for amending and enforcing the Laws relating to Rogues, Vagabonds, and other idle and disorderly Persons, and for reducing the same into one Act of Parliament: and also for amending the Laws for erecting, providing and regulating Houses of Correction.	To commence from 1 June 1740 Repealed by 17 Geo II c. 5
82.	17 Geo II c. 5	1744	An act to amend and make more effectual the laws relating to rogues, vagabonds and other idle and disorderly persons, and to houses of correction	
83.	32 Geo III c. 45	1792		
84.	5 Geo IV c. 84	1824		

### Appendix 3: *Irish transportation legislation 1695-1800*

	Regnal Title	Royal Assent	Name of Act and objective	Commencement & Duration
1.	7 Wil III c. 21	1 December 1695	An Act for the better suppressing Tories, Robbers, and Repparees; and for preventing Robberies, Burglaries, and other heinous Crimes	3 years from royal assent and then to the end of the first session of the following parliament
2.	9 Wil III c. 9	3 December 1697	An Act to Supply the Defects, and for better Execution of an Act passed this present Session of Parliament, intituled An Act for the better suppressing Tories, Robbers, and Repparees ; and for preventing Robberies, Burglaries, and other heinous Crimes	7 years from 6 November 1697 and to the end of the next session of the parliament after the end of 7 years, and no longer
3.	2 Anne c. 12	4 March 1703	An Act for the reviving an Act for taking away Benefit of Clergy in some Cases: and for transporting Felons	21 December 1703
4.	2 Anne c. 13	4 March 1703	An Act for continuing two Acts against Tories, Robbers, and Repparees Extended 7 Wil III c. 21 and 9 Wil III c. 9 which were found to be 'good and profitable laws for the kingdom, and fit to be continued	7 years from the end of this present parliament and to the end of the next session of parliament after the expiration of 7 years, and no longer
5.	6 Anne c. 11	13 October 1707	An Act for explaining and amending two several Acts against Tories, Robbers, and Repparees	29 September 1707 To continue for seven years from the end of this parliament and from thence to the end of the next session of parliament after the said seven years, and no longer. Section VII. In fact it was extended by 9 Geo II c. 6, and so far as not altered by 6 Geo I c. 12 and by 29 Geo II c. 8
6.	9 Anne c. 6	28 August 1710	An Act for taking away the Benefit of Clergy in certain Cases; and for taking away the Book in all Cases; and for repealing Part of the Statute for transporting Felons. Repealed 2 Anne c. 12 except for those provisions relating to harbouring, etc. tories, robbers, and repparees	
7.	6 Geo I c. 12	2 November 1719	An Act for the better and more effectual apprehending and transporting Felons and others, and for continuing and amending several Laws made in this Kingdom for suppressing Tories, Robbers, and Repparees	From and after 25 December 1719 (N.B. Sec 3 commenced 1 November 1719)
8.	8 Geo I c. 9	18 January 1721	An Act for amending an Act, intituled, An Act for the better and more effectual apprehending and transporting Felons and others; and for continuing and amending several Laws made in this Kingdom for suppressing Tories, Robbers, and	Act to continue for the space of five years and to the end of the next sessions of parliament after the said five years and no longer. Section XIII.

	Regnal Title	Royal Assent	Name of Act and objective	Commencement & Duration
			Rapport ; and also to prevent the listing of His Majesty's Subjects to serve as soldiers in foreign Service without His Majesty's Licence.	
9.	12 Geo I c. 8	8 March 1725	An Act for the more effectual transporting Felons and Vagabonds	From and after 25 April 1726
10.	3 Geo II c. 4	15 April 1730	An Act for the more effectual preventing and further Punishment of Forgery, Perjury, and Subornation of Perjury, and to make it Felony to Steal Bonds, Notes, and other Securities for Payment of Money, and for the more effectual transporting Felons, Vagabonds, and other	to continue in force for three years from 1 May 1730 and to end of the then session of parliament and no longer.
11.	9 Geo II c. 6	17 March 1735	An Act for continuing and amending several statutes now near expiring: 7 Wil III c. 21; 9 Wil III c. 9; 6 Anne c. 11; ...; 8 Geo I c. 9; 3 Geo II c. 4; 'as relates to the transporting felons, vagabonds, and penalties therein .	shall continue and be in full force and effect until ' 25 March 1751 + end of next session of parliament.
12.	17 Geo II c. 4	9 February 1743	An Act for the more effectual transportation of felons and vagabonds.	25 March 1744
13.	21 Geo II c. 12	9 April 1747	An Act for the more effectual punishment of assaults with an intent to commit robbery	1 June 1748
14.	29 Geo II c. 8	8 May 1756	An Act for continuing and reviving several temporary Statutes; etc: Extended: 7 Wil III c. 21; 9 Wil III c. 9; and 6 Anne c. 11; and so much of 4 Geo I c. 9; and 8 Geo I c. 9; and 3 Geo II c. 4; 9 Geo II c. 6;	Extended for 21 years from the end of this present session of parliament etc.
15.	17 & 18 Geo III c. 9	11 June 1778	To authorise for a limited time the punishment by hard labour of offenders who for certain crimes are or shall become liable to be transported to any of his majesty's colonies and plantations.	To continue in force for two years + to the end of the next session.
16.	26 Geo III c. 24	8 May 1786	An Act for the better Execution of the Law within the City of Dublin, and certain Parts adjacent thereto ; and for quieting and protecting Possessions within this Kingdom : for the more expeditions Transportation of Felons : and for reviving, continuing, and amending certain Statutes therein mentioned : and for repealing an Act passed in the Seventeenth and Eighteenth Tears of the Reign of His present Majesty, Entitles, An Act for improving the Police of the City of Dublin	
17.	30 Geo III c. 32	5 April 1790	An Act for rendering the Transportation of Felons and Vagabonds more easy	
18.	32 Geo III c. 27	18 April 1792	For the employing at hard labour persons sentenced to be transported	
19.	38 Geo III c. 59	6 October 1798	To remove doubts respecting the property in the service of persons transported from this kingdom	

	Regnal Title	Royal Assent	Name of Act and objective	Commencement & Duration
20.	38 Geo III c. 78	6 October 1798	To prevent persons from returning to his majesty's dominions who have been or shall be transported, banished or exiled on account of the present rebellion, and to prohibit them from passing into any country at war with his majesty	
21.	39 Geo III c. 36	7 May 1799	To explain, amend and extend the provisions of an act passed last session of parliament, entitled, an act to prevent persons from returning to his majesty's dominions who have been or shall be transported, banished or exiled on account of the present rebellion, and to prohibit them from passing into any country at war with his majesty.	
22.	40 Geo III c. 44	1 August 1800	To prevent persons from returning to his majesty's dominions who have been or shall be transported, banished or exiled on account of rebellion	

## **Appendix 4:**

### ***Details of 1614 London Session cases involving 'respite' orders***

#### ***1. Barnaby Littgold***

Chronologically, the first of these cases involved Barnaby Littgold who appeared before the justices on 6 February 1613 charged with stealing household goods and clothing. The record suggests the matter was unresolved and, as mentioned in Chapter 3, eight weeks later, on 4 April 1614 Littgold was again before the court on the same matter. The record, inconclusively, reads:

Thomas Batle of Paul's Wharf, waterman, to give evidence against Barnaby Littgold [Litgolde] for burglary. The said Barnaby to be respited to prison for sureties for good behaviour, or to be sent to Greenland by order of the Lord Mayor. Delivered by proclamation.<sup>1</sup>

William Le Hardy, the 1935 editor of the *Calendar to the Sessions Records, Volume 1*, identified the order against Littgold as the first recorded instance of the use of transportation.<sup>2</sup> But the Sessions record is not as definitive or as historic as Le Hardy suggested. The respite to be sent to Greenland was delivered in the alternative to Littgold producing sureties. But the record closes with the note that Littgold was 'delivered by proclamation' suggesting that Littgold's circumstances were being considered as part of Gaol Delivery at the end of a session and Littgold was to be released either for want of further authority to act against him, or because he had been acquitted but was still being held.<sup>3</sup> The designation of Greenland had some credence. In 1613 seven ships were sent to Greenland (Spitzbergen) by the Muscovy Company.<sup>4</sup> From the dates of the sentencing and the departure of the fleet, it might be inferred that Littgold's sentence missed the fleet's departure by a few days.

On 20 June 1614 Littgold was again before the justices accused of stealing a cloak from John Nicholls of St. Anne and St. Agnes parish, London.<sup>5</sup> Again the records are imprecise. The Sessions record states that 'The said Barnaby to be sent to the "Barmowdes".' The implication again is that Littgold was acquitted and, as was considered in Chapter 3, was being punished as a vagabond.

#### ***2. Helen Nutter***

A different aspect of the use of transportation was demonstrated in the second 1614 case to be examined here. As mentioned in Chapter 3, Helen Nutter of

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<sup>1</sup> Sessions, 1614: 5 and 6 May', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14* (1935), p. 400.

<sup>2</sup> See the Preface, William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14* (1935), pp. i-xxvi.

<sup>3</sup> Le Hardy comments on Greenland and Frobisher's discovery of Greenland in 1576 but omits any mention of the fact that Frobisher may have been accompanied by condemned prisoners which might suggest the Lord Mayor's use of such a sentence. See Kesselring, *Mercy and Authority in the Tudor State* (Cambridge, 2003), p. 84.

<sup>4</sup> Alexander Brown, *The Genesis of the United States* Volume 1, (Boston, 1891), p. 1013

<sup>5</sup> Sessions, 1614: 16 and 18 July', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), pp. 1-34



Charterhouse Lane was charged in May 1614 with the theft of broadcloth from a tailor, but was found not guilty. The Sessions record indicates, nevertheless, that on 17 May 1614 she was 'Respited to prison for the Indies'.<sup>6</sup> The record is at once confusing, suggesting some form of punishment in circumstances of innocence. One possible explanation for this outcome was that the justices believed, notwithstanding prosecution and acquittal, that prior behaviour, or demeanour, or both, suggested to the justices that she was an incorrigible (or even dangerous) vagabond, or at least could be treated as a vagabond and therefore banished in accordance with the statutory authority derived from 39 Eliz I c. 4. The use of 'respited' in this case adds an element of confusion because it would normally only have come into play if some other form of punishment had been ordered but, somehow, deferred. In the case of Helen Nutter it presumably meant that the respite was part of the process of the implementation of the punishment of banishment.<sup>7</sup>

### **3. Henry Bourne & William Clarke**

The third case, in June 1614, is more straightforward. On 20 June Henry Bourne and William Clarke of Edgeware were tried for sheep stealing. Bourne appears to have pleaded guilty but admitted to a felony previously committed in London for which he was to be hanged. Clarke was convicted by the jury but denied benefit of clergy by the court because he had pleaded it successfully on an earlier occasion: he too was to hang. But the Sessions record ends with the statement: 'Respited for the Bermudas'.<sup>8</sup> Whether the respite from capital punishment applied to both Bourne and Clarke, or only to Clarke, is not entirely clear.<sup>9</sup> Clarke was named in the open warrant of 23 January 1614 and was put ashore at Saldanha Bay of 20 June 1615.

### **4. Joan Sanson**

The next case to be considered was similar to the circumstances involving Helen Nutter. In this case, on 14 July 1614, Joan Sansom of Whitechapel was charged with stealing clothing and jewellery. Sansom, like Nutter, was found not guilty by the jury but the court, nevertheless, ordered that she 'was to be sent to the Bermudas'.<sup>10</sup> The sessions record underscores the circumstances of her acquittal

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<sup>6</sup> Sessions, 1614: 6 and 7 October', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 106.

<sup>7</sup> The Sessions Records also record a case involving a 'Helen Nutter', this time of Clerkenwell, as being before the courts in December 1614 on a charge of housebreaking, with two others. While the others were convicted the sessions record states: 'The said Helen not guilty' But goes on to add: 'Delivered by proclamation', suggesting there was insufficient evidence for a prosecution to proceed. In the meanwhile, if it was the same Helen Nutter, it may explain the apprehension of the justices in the first instance. The December 1614 incident is reported at Sessions, 1615: 13 and 16 January', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15* (1936), p. 204

<sup>8</sup> Sessions, 1615: 13 and 16 January', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936). p. 22

<sup>9</sup> PW Coldham, *The Complete Book of Emigrants 1607-1660* (Baltimore, 1987) at p. 6 suggests that both Bourne and Clarke were sent to America.

<sup>10</sup> Sessions, 1615: 13 and 16 January', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936). p. 25.

by pointing out that the goods purportedly ‘stolen’ were to be returned to their owner: ‘the acquittal of the said Joan notwithstanding.’ The implication here, as with Helen Nutter, was that Joan Sansom was probably being categorised as a vagabond and banished. If so, authority for this punishment must, similarly, have been derived from the statutes against vagabonds, 39 Eliz I c. 4 and I Jac I c. 7.

### 5. *Richard Storie*

The circumstances of Richard Storie were uncomplicated. Storie was convicted by the jury of horse-stealing on 27 July 1614 and ordered to be hanged but was ‘Respited to prison after judgment “for the Barmoodes”’, although no legal authority is stated by which the punishment was to be applied.<sup>11</sup> But two subsequent entries in the Gaol Delivery roll, one for 28 and 29 March 1615, and the other for 30 June and 3 July 1615, suggest that Storie was still in gaol a year later; the last of the entries indicating that he was reprieved, the only ‘reprieve’ order made in relation to the 1614 transportation orders being evaluated here. Whether Storie ever went to Bermuda is unclear.<sup>12</sup>

### 6. *George Shorte*

George Shorte had a more chequered history of court appearances. In July 1613 Shorte had appeared before the justices, along with ten other offenders, charged with housebreaking. The number of offenders, and the variety of goods stolen, suggests circumstances more than mere housebreaking; possibly a riot, or some sort of affray, or even some form of squatting. One of the ten offenders stood mute before the court and was ordered to *peine forte et dure*. The remaining offenders, except for Shorte, appear to have been convicted by the jury but then pardoned; Shorte alone was found not guilty.<sup>13</sup> Two months later, on 9 September 1613, George Shorte was delivered by proclamation as part of the commission of Gaol Delivery, suggesting that, notwithstanding the acquittal, he was still being held for some charge which had failed to convince either the grand jury or the justices of the desirability of proceeding against him.<sup>14</sup> Whether gaol delivery had seen Shorte released is unclear, but he appeared again in January 1614 as the subject of allegations of some unnamed felony. Once more, Shore was delivered by proclamation but again detained in gaol.<sup>15</sup> On 28 March 1614 the Sessions record cites that Shorte was: ‘To be sent to Bridewell to be whipped and shaved and kept at perpetual labour’.<sup>16</sup> What Shorte had done to attract this unusual

<sup>11</sup> Sessions, 1614: 30 and 31 August', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 38.

<sup>12</sup> Sessions, 1615: 28 and 29 March', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15* (1936), p. 254, and Sessions, 1615: 30 June and 3 July', *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15* (1936), p. 338.

<sup>13</sup> Sessions, 1613: 4 and 6 August', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14*, (1935), p. 165

<sup>14</sup> Sessions, 1613: 8 and 9 September', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14*, (1935), p. 212

<sup>15</sup> Sessions, 1614: 11 and 12 January', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14* (1935), p. 322

<sup>16</sup> Sessions, 1614: 28 and 30 March', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14* (1935), p. 400

punishment is not specified although it does suggest that he was being punished more as a vagabond than as a felon. On 3 September 1614 Shorte was charged with housebreaking and stealing household goods. This time Shorte was found guilty by the jury and sentenced by the court to hang. But this time the Sessions record notes that Shorte was: 'Respited to prison for the Indies.'<sup>17</sup> Whether Shorte was actually sent anywhere is not recorded. The frequency of Shorte's appearances before the courts and the ultimate failure capitally to punish him invites consideration that Shorte has some attractive personal qualities that both landed him in frequent trouble with the law, but which might also have attracted some form of protection or patronage.

The final 1614 orders for reprieve and transportation relate to a group of offenders who are listed in the gaol delivery roll for 7 October 1614, indicating that they were all still in gaol for some earlier offence and the justices were determining their final disposition. The group comprised; Robert Dennys, Thomas Peirse, Elizabeth Jones (or Johnson), John Duffield, John Crosse, and Augustine Callys and details about some of these is both available and instructive about the use of the respite.

### **7. Robert Dennys**

Subject to issues about the proper spelling of his name, the gaol delivery roll of 7 October 1614 simply records that Robert Dennys, who was awaiting punishment for felony was to be, 'Respited for the Indies.' A Robert Denny attracted some notoriety in November 1613 by breaking into the royal palace of Westminster and stealing plate belonging to Lord Wooten, the comptroller of James I's household. In the preface to Volume 1 of the *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14*, the editor, William Le Hardy, noted that Denny was hanged, but gives no date.<sup>18</sup> But the Sessions record for 18 February 1614 notes that a Robert Dennys was respited after judgement, without mentioning any offence. It is tempting to consider that Denny and Dennys were the same person. It would help explain the circumstances of a Robert Dennys remaining in gaol in October 1614 and being respited finally to be sent to the Indies.

### **8. Thomas Peirse**

The records about Thomas Peirse are brief. He is identified as being 'taken with picklocks and other such-like instruments' and was ordered to be, 'Respited for the Indies'.<sup>19</sup> The records about Elizabeth Jones are equally brief. Whatever her offence, Jones's problem was 'default of sureties', suggesting that she was being punished as a vagabond. Like Thomas Peirse, Jones was ordered to be 'Respited for the Indies'.<sup>20</sup> In none of these cases is there any recorded legal authority

<sup>17</sup> Sessions, 1614: 6 and 7 October', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 108

<sup>18</sup> Preface', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14*, (1935), p. xvi

<sup>19</sup> Sessions, 1614: 6 and 7 October', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 114.

<sup>20</sup> *Ibid.*

offered for the respite and transportation order, although it is possible that Peirse was being treated as a vagabond. Peirse was named in the open warrant of 23 January 1614.

### **9. John Duffeild**

John Duffeild posed more technical problems, possibly of jurisdiction. Duffeild appeared before the Middlesex justices on 7 October 1614 for an unspecified offence, for which he must have been convicted. But the records indicate that he was respited after judgement and was to be sent to the Bermudas.<sup>21</sup> But in December of that year, Duffeild's punishment is recorded as being respited, it being noted that 'John Duffeild alias Scatterfeild to remain till he may be sent away into Holland where his estate lyeth.'<sup>22</sup> Tudor legislation against vagabonds had sometimes made distinctions between English and foreign vagabonds, with the latter being sent home without further punishment. Whether this was what was occurring in the case of John Scatterfeild, alias Duffeild, is not clear. In any event, John Duffeild was included in the open warrant of 23 January 1614.

### **10. John Crosse**

The remaining two orders of transportation were comparatively straightforward. John Crosse, the only 'gentleman' among the thirteen offenders being considered here, was convicted of stealing in circumstances which sounded much like highway robbery and was, on 9 February 1614 sentenced to be hanged. Oddly, two weeks later on 23 February 1614 evidence was still be given against Crosse for highway robbery, presumably a different event to that which had led to his condemnation on 9 February. Crosse was ordered to be 'Respited without bail', suggesting that respited here was being used differently to its use elsewhere.<sup>23</sup> For reasons which are not clear, Crosse was still being held in gaol in October and was ordered to be, 'Respited after judgement', and to be sent to Bermuda.<sup>24</sup> Crosse was named in the open warrant of 23 January 1614 and was put ashore at Saldanha Bay on 20 June 1615.

### **11. Augustine Callys**

Augustine Callys was convicted of burglary on 8 or 9 June 1614 and sentenced to be hanged but, along with John Crosse, was respited on 7 October 1614 to be sent to 'the Bermudas'.<sup>25</sup> Augustine Callys was included in the open warrant of 23 January 1614.

Outside the immediate frame of this present narrative, but also considered as part of the gaol delivery process held on 7 October 1614 were two other names of

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<sup>21</sup> *Ibid.*

<sup>22</sup> Sessions, 1614: 3 and 5 December', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 175

<sup>23</sup> Sessions, 1614: 5 and 6 May', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 1: 1612-14*, (1935), p. 412 and Sessions, 1614: 28 and 30 March', William Le Hardy ed. , (1935), p. 384

<sup>24</sup> Sessions, 1614: 6 and 7 October', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 114

<sup>25</sup> *Ibid.*

relevance. They are Raphe (or Ralph) Bateman and Able Metcalf. Both were sentenced to hang for unspecified offences.<sup>26</sup> Metcalf was not mentioned in the open warrant of 23 January 1614, but was put ashore at Saldanha Bay on 20 June 1615. From this it can be assumed that Metcalf was one of the three volunteers.

The names of the presiding justices at the 7 October gaol delivery are not recorded.

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<sup>26</sup> Sessions, 1614: 6 and 7 October', William Le Hardy ed. *County of Middlesex. Calendar to the sessions records: new series, volume 2: 1614-15*, (1936), p. 114

**Appendix 5:**  
***The transportation of vagabonds during the reigns of James I  
and Charles I***

**Vagabonds transported during the reign of James I**

Year	No.	Comment	Year	No.	Comment
1603			1615		
1604			1616		
1605			1617	1	
1606	2	Cockburn, p. 27.	1618	67	All but 3 from Bridewell
1607			1619	154	This number may include 100 (99) children sent to Virginia by the Corporation of London <sup>1</sup>
1608			1620	233	This number may include 100 (99) children sent to Virginia by the Corporation of London
1609			1621	4	
1610			1622	2	
1611			1623		
1612			1624	12	
1613			1625		
1614	2		<b>Total</b>	477	See footnote.

**Vagabonds transported during the reign of Charles I**

Year	No.	Comment	Year	No.	Comment
1625			1638	4	
1626	1		1639	14	
1627	4		1640	5	
1628	8		1641		
1629			1642	1	
1630	2		1643		
1631	7		1644		
1632	4		1645		
1633	4		1646		
1634	6		1647		

<sup>1</sup> This may doubly account for the 100 children sent to Virginia under the auspices of the London Corporation. PW Coldham, *The Complete Book of Emigrants 1607-1660* (Baltimore, 1987), used the Gregorian calendar; this may lead to some dating errors. Coldham lists 99 children from Bridewell as being identified on 27 February 1619 (NS). These should probably, and more correctly, listed in 1620 OS when the Privy Council records authorise their transportation to Virginia.

1635	7		1648		
1636	5		1649		
1637	8		<b>Total</b>	80	

**Source:** Peter Wilson Coldham, *The Complete Book of Emigrants 1607-1660*, (Baltimore, 1987).

**Appendix 6:**  
***A summary of the transportation of felons pursuant to the  
prerogative during the reigns of James I and Charles I***

James I			Charles I		
Year <sup>1</sup>	No.	Source	Year	No.	Source
1603			1625		
1604			1626	1	APC
1605			1627		
1610			1628		
1607			1629		
1608			1630		
1609			1631		
1610			1632		
1611			1633		
1612			1634	1	Coldham p. 118
1613			1635	15	CSPD 1636 p. 262
1614	3	Coldham p. 6	1636	6	CSPD 1635-6 p. 437
1615			1637		
1616			1638		
1617	1	Coldham p. 8	1639	14	CSPD 1638-9 p. 435
1618	8	Coldham pp. 8-11	1640	27	CSPD 1639-40 pp. 183, 349, and 486
1619	18	Coldham pp. 11-15	1641		
1620	5	Coldham pp. 16-22	1642		
1621	4	Coldham pp. 23-25	1643		
1622	72	Coldham pp. 26-30	1644		
1623	2	Coldham pp. 31-34	1645		
1624	3	Coldham pp. 47-49.	1646	11	Coldham p. 232
1625			1647		
			1648		
			1649		
<b>Total</b> :	<b>116</b>		<b>Total</b> :	<b>75</b>	

**Source:** Compiled from Peter Wilson Coldham, *The Complete Book of Emigrants 1607-1660*, (Baltimore, 1987). And *Calendar of State Papers, Domestic*.

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<sup>1</sup> Coldham uses NS dating



**Appendix 7:**  
***A summary of use of open warrants and reprieved during the  
reign of James I 1614-1624***

	Date	Names of offenders	Place & Justice(s)	Destination or custodian	Ref.
1.	23 Jan 1614	17 men listed in the open warrant	London	Sir Thomas Smythe East Indies &c	See Chapter 4
2.	7 Jul 1615	Thomas Gates Philip Halse William Isgrave	London Sir Daniel Dunn Admiralty	Smithe; EI or other partes	APC 1615-16 p. 248
3.	Ditto	William Harrison Arthur Pelliton Matthew Clifton	Ditto Sir Henry Montague Recorder	Ditto These were the last men sent to Saldanha Bay	Ditto See Chapter 4
4.	24 Mar 1616	John Browne	Canterbury Sir Henry Finche & Sir William Lovelace JP	Sir Thomas Smith 'or those whome he shall appoint to receive him	APC 1616-17 p. 202
5.	13 Jul 1617	Christopher Potley Roger Powell Sapcott Molineux Thomas Middleton Thomas Crouchley	Oxford Sir Peter Warberton & Sir Randall Crew	Sir Thomas Smythe to Virginia or other parts beyond the seas	APC 1616-17 p. 301
6.	30 Sep 1617	James Knott	Newgate Lord Mayor & Recorder	Smythe, East Indies	APC 1616-17 p. 336
7.	30 Sep 1617	Henry Hall	Cambridge Mayor & Recorder	Smith or his assigns ditto	ditto
8.	15 Nov 1617	Richard Ashman Richard Harding	Southwark Sir Robert Houghton J	Ditto 24 March	APC 1616-17 p. 369
9.	24 Aug 1617	George Harrison	Hartford		
10.	20 Mar 1617	William Lambe	Newgate Lord Mayor & Aldermen	Smith Virginia	APC 1617-19 p. 82
11.	14 Jun 1618	Ambrose Smyth	Newgate Sir Richard Wigmore et al	Smith East Indies	APC 1617-19 p. 170
12.	4 Jul 1618	34 names Jesuits from gaols	Newgate, Dover, York, Lancaster,	Count of Gondomar	APC 1617-19 pp. 202-

		around England	Chester, Southampton & Exeter	To foreign parts out of HM's dominions	3
13.	26 Jul 1618	John Throgmorton	Newgate Lord Mayor & Recorder of London	Sir Thomas Smythe East Indies or elsewhere	APC 1617- 19 pp. 232- 3
14.	27 Sep 1618	Henry Johnson	Newgate	Smith East Indies	APC 1617- 19 p. 259
15.	31 Oct 1618	Ann Russell	Newgate Aldermen Bolles & Jolles	Sir Thomas Smythe Virginia	APC 1617- 19 pp. 265- 6
16.	30 Nov 1618	James Stringer	Newgate JPs for Middlesex	Sir Thomas Smythe Virginia or other	APC 1617- 19 p. 327
17.	14 Feb 1618	Henrie Reade (Harry Reade in CSPD)	Newgate Sir Ed. Sackville, Sir Rich. Wigmore JPs and Recorder Heath	Sir Thomas Smythe East Indies or other 3 Feb 1618 Lord Russell to Sir Edmund Clements begs despatch to HR to be sent to Virginia	APC 1617- 19 p. 369 CSPD 1619-23 p. 19
18.	10 Apr 1619	Henry Lightwoode	Newgate Sir Thom. Bennett , Sir John Lemon and Recorder Heath	Sir Thomas Smythe East Indies or other	APC 1617- 19 pp. 418- 9
19.	29 Dec 1619	John Hayward	London LM Middleton Recorder Heath	Sir Thomas Smythe Foreign employment	APC 1619- 21 p. 101
20.	Undated 1619	Named offenders not committed for murder and are reprieved	Sir William Cockayne LM of London	Fit to do service in foreign parts	CSPD 1619-23 p. 111
21.	22 Nov 1620	Samuel Turner Mentioned in CSPD 23 Aug 1621	Norwich Recorder and Steward of the city	Sir Thomas Smythe Implied in partes beyond the seas Sent to East Indies	APC 1619- 21 p. 316 CSPD 1619-23 p. 284
22.	9 Feb 1620	Phillip Golde	Norwich Norfolk JPs	Sir Thomas Smythe To be sent to foreign parts	APC 1619- 21 p. 344
23.	2 May 1622	Daniell Frank* William Beare John Ireland	Southwark Sir Randolph Crewe	The Governor of the Company of Virginia To Virginia with	APC 1621- 23 p. 206

				all speed	
24.	12 Aug 1622	James Wharton	Norfolk JPs for Norfolk	Order for sending him to Virginia	APC 1621-23 p. 310
25.	20 Nov 1622	John Carter	London Lord Mayor & Recorder	Sir Edward Sackville To Virginia or Bermuda	APC 1621-23 p. 356
26.	20 Nov 1622	Frances Battersey & 67others	Newgate and Bristol (1) Recorders of London	To be employed on certain works or sent abroad.	CSPD 1619-23 p. 462
27.	19 Feb 1622	William Dominicke	Lord Mayor, Alderen and Recorder Henage Finch including Sir Allen Apsley	Sir Allen Apsley Os employment	APC 1621-23 p. 411
28.	28 Mar 1623	Robert Parker	St Albans JPs for Hertford	[ ]	APC 1621-23 p. 454
29.	26 May 1623	Nichols Hasie	JPs for Middlesex and Recorder Finch + Sir Allen Apsley	Sir Allen Apsley	APC 1621-23 p. 506
30.	16 Jun 1624	Richard Lambert	KB prison Sir James Ley CJ	Sir John Burlaice Who has order to dispose of him	APC 1623-25 p. 243
31.	28 Jul 1624	John Worley	KB Prison Sir James Ley CJ	Captaine Conisby, Commander of E of Southampton	APC 1623-25 p. 285
32.	5 Aug 1624	Robert Parker alias Yeo	London Lord Mayor and Recorder	Sir Edward Conway Employ in foreign partes	APC 1623-25 p. 292
33.	19 Nov 1624	William Thomas	KB prison CJ of KB	Captain Richard Vaughan ?	APC 1623-25 p. 365

**Source:** *Acts of the Privy Council, 1615-1616, 1616-1617, 1617-1619, 1619-1621; 1623, and 1623-1625 and CSPD 1619-1623.*

\*Dan ffranke mentioned at p. 102 of the Records of the Virginia Company, Vol. 1 as being sent to Virginia where he had been contracted to serve Elianor Phillipps, 'that nowe goes ouer with him, whereof the said Phillipps offers to pay for his passage if the Companie please to permit the said ffranke to goe.'

## Appendix 8:

### *Open warrants of James I & Charles I: a comparative Table of Sources*

	Date	Abbot Emerson Smith <sup>i</sup>	Peter Wilson Coldham <sup>ii</sup>	Comment
1.	23 January 1614/5	<i>Acts of the Privy Council</i> , 1615-1616, pp. 23-5 Smith refers to 24 January p. 94.	<i>Acts of the Privy Council of James I</i> , Vol 2., p. 23	
2.	1 March 1616/7	Contemporary manuscript index of the Patent Rolls, Legal Search Room at PRO		
3.	24 March 1616/7			I have found <i>Acts of the Privy Council</i> , 1616-1617, pp. 201-2
4.	10 April 1617			I have found a specific reprieve at <i>Acts of the Privy Council</i> , 1616-1617, pp. 225
5.	6 November 1619		<i>Acts of the Privy Council of James I</i> , Vol 2., p. 53	
6.	23 January 1619/20?		<i>Acts of the Privy Council of James I</i> , Vol 5., p. 118	Children from London Also in <i>C.S.P. Domestic</i> , 1619-1623, p. 118
7.	1620?		<i>Acts of the Privy Council of James I</i> , Vol 5., p. 175	
8.	23 September 1621			<i>Acts of the Privy Council</i> , 1621-1623 p. 46. AG to prepare a new commission
9.	5 November 1621			<i>C.S.P. Domestic</i> , 1619-1623 p. 306
10.	30 April 1622	Contemporary manuscript index of the Patent Rolls, Legal Search Room at PRO		Also in <i>C.S.P. Domestic</i> , 1619-1623, p. 383
11.	21 July 1622			<i>Acts of the Privy Council</i> , 1621-1623 p. 294. AG to prepare a new commission
12.	10 August 1622			<i>C.S.P. Domestic</i> , 1619-1623 p. 439
13.	2 September 1622	Contemporary manuscript index of the Patent Rolls, Legal Search Room at PRO		
14.	29 January 1625/6			New commission to be prepared. See <i>C.S.P. Domestic</i> , Vol. 12, 1625-1626, p. 238
15.	8 March 1625/6	Contemporary manuscript index of the Patent Rolls, Legal Search Room at PRO		
16.	15 August 1628			<i>Acts of the Privy Council</i> , 1628-1629 p. 103. AG to prepare a new commission
17.	20 September 1628	Contemporary manuscript index of the Patent Rolls, Legal Search Room at PRO		
18.	Undated 1629			Draft of intended commission . <i>C.S.P. Domestic</i> , Vol 15, 1629-1631, p. 131

19.	23 February 1632/3	Contemporary manuscript index of the Patent Rolls, Legal Search Room at PRO		And see <i>C.S.P. Domestic</i> , Vol. 16. 1631-1633, p. 547
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**Appendix 9:**  
***A comparative analysis between English 4 Geo I c. 11 and Irish 6 Geo I c. 12***

Britain: 4 Geo I c. 11 – 1717	Ireland: 6 Geo I c. 12 - 1719
<i>An act for the further preventing Robbery, Burglary, and other Felonies, and for the more effectual Transportation of Felons, and unlawful Exporters of Wool; and for declaring the Law upon some Point s relating to Pirates</i>	<i>An Act for the better and more effectual apprehending and transporting Felons and others, and for continuing and amending several Laws made in this Kingdom for suppressing Tories, Robbers, and Repparees</i>
Commenced 21 January 1717. Repealed 7 & 8 Geo 4, c. 27, s. 1	From and after 25 December 1719 (N.B. Sec 3 commenced 1 November 1719)
<p>Whereas it is found by Experience, That the Punishments inflicted by the Laws now in Force against the Offences of Robbery, Larceny and other felonious Taking and Stealing of Money and Goods, have not proved effectual to deter wicked and evil-disposed Persons from being guilty of the said Crimes:</p> <p>And whereas many Offenders to whom Royal Mercy hath been extended, upon Condition of transporting themselves to the <i>West-Indies</i>, have often neglected to perform the said Condition, but returned to their former Wickedness and be at last for new Crimes brought to a shameful and ignominious Death:</p> <p>And whereas in many of his majesty's Colonies and Plantations in <i>America</i>, there is great Want of Servants, who by their Labour and Industry might be the means of improving and making the said Colonies and Plantations more useful to this Nation:</p> <p>Be it enacted –</p> <p>[Preamble + Section I]</p>	<p>Whereas it is found by experience, that the punishments, inflicted by the laws now in force against the offences of robbery and felony, have not proved effectual to deter wicked and ill disposed persons from committing the said crimes:</p> <p>And whereas many offenders, to whom royal mercy has been extended on condition of transporting themselves to the West-Indies, have often neglected to perform the same, but instead thereof have abused the mercy shewn to them by his Majesty, or chief governor or governors of this kingdom;</p> <p>And by that means several gaols of this kingdom are at this time filled with such offenders; which is not only an encouragement to such to go on in their wicked practices, but is a great charge to such cities and counties, where such persons lie confined;</p> <p>to remedy the same for the future, be it enacted -</p> <p>[Preamble + Section I]</p>
Note: the following propositions are in the reverse order	
<p>That were any person or persons who have been convicted of any Offence <b>within the Benefit of Clergy</b>, before 20 January 1717, and are liable to be whipt or burnt on the Hand, or have been ordered to any Workhouse, and who shall be therein on the said 20 January 1717;</p> <p>As also where any Person or Persons shall be hereafter convicted of Grand or Petit Larceny, or any other felonious Stealing or Taking of Money or Goods and Chattels, either from the person, or the House on any other, or in any Manner, and who by the law shall be entitled to the benefit of Clergy, and liable only to the Penalties of Burning in the Hand or Whipping, (except Persons convicted of receiving or buying stolen Goods, knowing them to be stolen) it shall and may be lawful for the Court before whom they were convicted, or any Court held at the same Place with the like Authority, if they think fit, instead of ordering any such Offenders to be burnt in the Hand, or whipt, to order and direct, That such Offenders, as also such Offenders in any Workhouse, as aforesaid, shall be sent as soon as conveniently may be, to some of his Majesty's</p>	<p>... that if any person shall after 1 November 1719 commit any grand or petty larceny, or feloniously steal or take away money, good, chattels, from the person or the house of any other for which such offender, as the law now stands, is <b>intituled to the benefit of clergy</b>, it shall and may be lawful for the court, before whom they were convicted, or any court held at the same place with the like authority, if they think fit, instead of ordering any such offender to be burnt in the hand or whipt, to order and direct that such offenders shall be sent to such sea-port, city or town in manner aforesaid, that they may be transported, as soon as conveniently may be, to some of his Majesty's colonies and plantations in America for the space of seven years;</p> <p><u>And that court</u>, before whom they were convicted, or</p>

Britain: 4 Geo I c. 11 – 1717	Ireland: 6 Geo I c. 12 - 1719
<p>Colonies and plantations in <i>America</i> for the Space of seven Years:</p> <p>And that Court before whom they were convicted, and any subsequent Court held at the same Place, with like authority as the former, shall have power to convey, transfer and make over, such Offenders, by Order of the Court, to the Use of any Person or Persons who shall contract for the Performance of such Transportation, to him or them, and his and their Assigns, for such Term of <u>seven</u> years:</p> <p>[Section I]</p>	<p>any subsequent court held at the same place with like authority as the former, <u>shall have the power to convey, transfer, and make over, such offenders by order of the court to the use of any person or persons, who shall contract in manner aforesaid: for the performance of such transportation to him or them, and his and their assigns for the term of seven years, to commence from the time of the offenders landing in America.</u></p> <p>[Section III]</p>
<p>And where any Persons have been convicted, or do now stand attainted of any Offences whatsoever, for which, Death by Law ought to be inflicted, or where any Offenders shall hereafter be convicted of any crimes whatsoever, for which they are by Law to be <b>excluded the Benefit of Clergy</b>, and his Majesty, his Heirs and Successors, shall be graciously pleased to extend Royal Mercy to any such Offenders, upon the Condition of Transportation to any Part of <i>America</i>, and such Intention of Mercy signified by one of his Majesty's Principal Secretaries of State,</p> <p>It shall and may be lawful to and for the any Court having proper Authority, to allow such Offenders the Benefit of a Pardon under the Great Seal, and to order and direct the like Transfer and Conveyance to any Person or Persons, (who will contract for the Performance of such Transportation) and to his and their Assigns, of any such before-mentioned Offenders, as also to any person or Persons convicted of receiving or buying stolen Goods, knowing them to be stolen, for the term of <u>fourteen</u> Years, in case such Condition of Transportation be general, or else for such other Term or terms as shall be made Part of such Condition, if any particular Time be specified by his Majesty, his heirs and Successors, as aforesaid;</p> <p>And such Person or Persons so contracting, as aforesaid, his or their Assigns, by virtue of such Order of Transfer, as aforesaid, shall have a Property and interest in the service of such Offender for such Term of Years.</p> <p>[Section I]</p>	<p>That were any person or persons have been convicted, or do now stand attainted, of any offence whatsoever, for which death at law ought to be inflicted, or transportation ordered, or where offender shall hereafter be convicted of any crimes whatsoever, for which by law they are to be <b>excluded from benefit of clergy</b>; and his Majesty, his heirs and successors, or his or their chief governor or governors of this kingdom, shall be pleased to extend mercy to any such offender on the condition of transportation to any part of America,</p> <p>it shall and may be lawful from and after the 25 December 1719 for the several judges of assize, judges of the King's bench, commissioners of oyer and Terminer, and the justices of the sessions to be holden for the city and county of the city of Dublin, to allow such offenders the benefit of a pardon on the <u>condition of transportation</u>: and that the same may be done will all convenient speed, the several judges of assize, judges of the King's bench, commission of oyer and terminer, and justices aforesaid, shall have full power and authority, and are hereby required to order and direct a warrant of transportation for all such offenders;</p> <p>and in case the offenders shall not be in the city of Dublin, or some other sea-port, which trade to some of his Majesty's plantations in America, such judges, commissioners, or justices, shall immediately order the sheriff or sheriffs of such counties or cities, where such offenders are, to transmit without fee or reward such person or persons, who now do or hereafter may lie under such rule of transportation to the next sea-port, city, or town, which trade to some of his Majesty's plantations in America, and there to be delivered by the said sheriff or sheriffs to the magistrate or officer of such sea-port, city, or town, who is hereby required to secure such person or persons till transportation can be had for them;</p> <p>[Section I]</p> <p>security</p>
<p>And be it further enacted by the Authority aforesaid, That if any Offender or Offenders, so ordered by any such Court to be transported for any Term of seven Years or fourteen Years, or other Time or Times, as aforesaid, shall return into any Part of <i>Great Britain</i> or <i>Ireland</i> before the End of his or their said Term, he or she so returning, as aforesaid, shall be liable to be punished as any Person attainted of Felony without the Benefit of Clergy; and Execution may</p>	

Britain: 4 Geo I c. 11 – 1717	Ireland: 6 Geo I c. 12 - 1719
<p>and shall be awarded against such <a href="#">Offender</a> or Offenders accordingly:</p> <p>Provided nevertheless, That his Majesty, his Heirs and Successors, may at any Time pardon and dispense with any such Transportation, and allow of the Return of any such Offender or Offenders from <i>America</i> , he or they paying their Owner or Proprietor, at the Time of such Pardon, Dispensation or Allowance, such Sum of Money as shall be adjudged reasonable by any Two Justices of the Peace residing within the Province where such Owner dwells; and where any such Offenders shall be transported, and shall have served their respective Terms, according to the Order of any such Court, as aforesaid, such Services shall have the Effect of a Pardon to all Intents and Purposes, as for that Crime or Crimes for which they were so transported, and shall have so served, as aforesaid.</p> <p>Section II</p>	
<p>The third class of people addressed are-</p> <p>'many idle Persons, who are under the Age of one and twenty Years, lurking about in divers Parts of London, and elsewhere, who want Employment, and may be tempted to become Thieves, if not provided for: And whereas they may be inclined to be transported and enter into Services in some of his Majesty's Colonies and Plantations in America.</p> <p>There is no issue here of this class of idle Persons being convicted of any crime or of them being punished.</p>	
	<p>Process is carefully prescribed:</p> <ul style="list-style-type: none"> <li>• justices to order and direct a warrant for transportation</li> <li>• send to nearest sea-port where sheriff there to give security, take custody and find merchant to undertake transportation</li> <li>• costs to be reimbursed and levied on the county by the grand jury</li> <li>• transportation also to be at the 'the public charge' of the county where the offender was convicted.</li> <li>• Sheriff and magistrates who have charge of offender empowered to enter into contracts and:</li> <li>• 'after such contract made, such offenders shall be transferred and conveyed by the said magistrate or officer to such other person or persons, and to his or their assigns, to be by them transported; ..."</li> <li>• Sheriff conveying offender to lodge certificate etc.</li> </ul>
	<p>Any person returning before the end of the term - he or she so returning ... shall be liable to be punished, as any person attainted of felony, without the benefit of clergy.</p> <p>[Section IV]</p>
	<p>Any person sharing in the proceeds of stole goods, unless they give evidence against the offender at trial,</p>



Britain: 4 Geo I c. 11 – 1717	Ireland: 6 Geo I c. 12 - 1719
	shall be guilty of felony and shall suffer the pains of felony etc. at law (N.B. no mention of benefit of clergy).
	Issue of payment of rewards for capture of tories, etc.
	<p>Legislation suppressing tories, robbers, and repparees which was about to expire extended for 7 years. (Further extended by later acts)</p> <p>7 Wil III c. 21 <i>An act for the better suppressing tories robbers, and repparees, and for preventing robberies, burglaries, and other heinous crimes.</i></p> <p>9 Wil III c. 9 <i>An act to supply the defects, and for the better execution of, an act passed this present session of Parliament, intituled, An act for the better suppressing tories robbers, and repparees, and for preventing robberies, burglaries, and other heinous crimes.</i></p> <p>6 Anne 11 <i>An act for explaining and amending two several acts against tories, robbers, and repparees</i></p> <p>4 Geo I c. 9 <i>An act for reviving, continuing, and amending several statutes made in this kingdom heretofore temporary</i></p>
This act did not apply to Scotland.	
<p>In 1766 6 Geo III, c. 62 extended the act to Scotland.</p> <p>In 1785 25 Geo III, c. 46 extended the provisions of 24 Geo III, c. 56 to Scotland.</p>	

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- PC 2/136: Privy Council Registers; George III, Volume 29, 1 April 1791-30 April 1792.
- PC 2/137: Privy Council Registers; George III, Volume 30, 1 May 1792-28 February 1793.
- PC 2/139: Privy Council Registers; George III, Volume 32, 1 October 1793-30 April 1794.
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- Fiche 631;
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<http://www.records.nsw.gov.au/state-archives/research-topics/convicts/sentenced-beyond-the-seas/list-of-the-ships-included-in-sentenced-beyond-the-seas>

Alphabetical lists of convicts on Transports 1788-1800:

NRS 1150 [4/3999]

NRS 1150 [SZ115] 1150\_SZ115\_0098, (*Neptune*).

NRS 1150 [SZ115] 1150\_SZ115\_0102, (*Scarborough*).

NRS 1150 [SZ115] 1150\_SZ115\_0086, (*Surprise*).

NRS 1150 [SZ115] 1150\_SZ115\_0172, (*Atlantic*).

NRS 1150 [SZ115] 1150\_SZ115\_0190, (*William and Ann*).

NRS 1150 [SZ115] 1150\_SZ115\_0217, (*Britannia*).

NRS 1150 [SZ115] 1150\_SZ115\_0161, (*Matilda*).

NRS 1150 [SZ115] 1150\_SZ115\_0182, (*Salamander*).

NRS 1150 [SZ115] 1150\_SZ115\_0198, (*Albemarle*).

NRS 1150 [SZ115] 1150\_SZ115\_0153, (*Mary Ann*).

NRS 1150 [SZ115] 1150\_SZ115\_0224, (*Admiral Barrington*).

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